Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

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INDU CRAFT, INC.,

Petitioner,

v.

BANK OF BARODA and
KRISHNAKANT C. CHOKSHI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Re-examination clause of the Seventh Amendment of the U.S. Constitution prohibit a federal appeals court from spontaneously reducing a jury's damage award -- which the appeals court found to be supported by evidence -- by a "setoff"?

2. Should a federal court exercising diversity jurisdiction award postjudgment interest under the federal interest statute, 28 U.S.C. §1961, or, consistent with the Erie doctrine, under state law?

3. Should post-judgment interest under 28 U.S.C.§ 1961 commence from the date of (a) the first judgment which was set aside by the trial court itself, which setting aside was reversed by the U.S. Court of Appeals some three years later, and the first judgment substantially modified, or (b) the final judgment mandated by the U.S. Court of Appeals?

4. Whether pre-judgment interest may be compounded under New York law where the defendants acted in bad faith, or whether the failure to raise that issue before the trial court precludes the awarding of such compound interest?

5. Whether the trial court's failure to instruct the jury on punitive damages for prima facie tort, where such damages were properly available under state law, was an error warranting reversal and a retrial on the issue?

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INDUCRAFT, INC.,

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v.

BANK OF BARODA and KRISHNAKANT C. CHOKSHI,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgments and orders of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 3, 1995, October 4, 1995 and July 9 and 12, 1996.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties. There are no parent companies. There are no nonwholly- owned subsidiaries.

OPINIONS AND ORDERS BELOW

The first opinion of the United States Court of Appeals for the Second Circuit appears at 47 F.3d 490, A-1a.[1] The subsequent District Court opinion appears at 1995 WL 479516, A-80a, and the unreported judgment thereon appears at A-90a. An October 4, 1995 unreported order of the Second Circuit appears at A-18a. The second opinion of the Court of Appeals, decided June 13, 1996, is unreported and appears at A-20a. As amended by the Court on July 9, 1996, it appears at 87 F.3d 614, A-43a. An unreported order denying a Petition for Rehearing was entered on July 12, 1996, A- 102a.

JURISDICTION

Judgments and orders of the Court of Appeals were entered on February 3, 1995 (A-1a), October 4, 1995 (A-18a) and July 9, 1996 (A-34a). A timely application for rehearing was denied by an order entered July 12, 1996 (A-102a).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] "A" refers to the Appendix filed herewith.

STATUTES AND RULE INVOLVED

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

Rule 37 of the Federal Rules of Appellate Procedure. Interest on Judgments

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

New York Civil Practice Law and Rules:

Section 5001. Interest to verdict, report or decision

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

***

Section 5002. Interest from verdict, report or decision to judgment

Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. The amount of interest shall be computed by the clerk of the court and included in the judgment.

Section 5003. Interest upon judgment

Every money judgment shall bear interest from the date of its entry. Every order directing the payment of money which has been docketed as a judgment shall bear interest from the date of such docketing.

Section 5004. Rate of Interest

Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.

STATEMENT OF THE CASE

Indu Craft, Inc. ("Indu Craft"), a New York corporation then wholly owned by its President, Hemant Mehta, was an importer and wholesaler of sportswear throughout the United States. In 1983, it obtained a $500,000 line of credit from the respondent Bank, which was wholly owned by the Government of India. In December 1986, the Bank increased this facility to $2.7 million (including an overdraft facility of $1.2 million). Indu Craft issued a promissory note ("Note") as collateral.

The Bank often allowed Indu Craft to exceed its overdraft limit by as much as 40 percent, and typically granted letters of credit within 24 hours of application. Thereby, Indu Craft's merchandise was manufactured and shipped quickly to the U.S.

In November 1986, respondent Chokshi -- the Bank's then- Manager in New York -- requested Mehta to invest in a business (ICCS) for the benefit of Chokshi's son. After evaluating the proposal, Mehta rejected it in February 1987.

In short order, the Bank reduced Indu Craft's credit facilities significantly. Chokshi falsely informed Indu Craft that the reduction was directed by the Bank's central office in India; in fact the central office was unaware of the reduction. Further letters of credit were substantially delayed, if issued at all. The Bank then demanded that Indu Craft's applications for letters of credit be backed 100% by confirmed customer orders. The Bank knew that commercial practices in the garment industry made such requirement commercially impossible to comply with. Moreover The Bank did not issue any letters of credit to Indu Craft after May 4, 1987. The Bank repeatedly assured Indu Craft that its credit facilities would be restored, but never did so. Meanwhile, due to the Bank's delays and refusal to issue new letters of credit, Indu Craft's suppliers stopped producing goods and delayed shipments. Garments arrived late and had to be sold at substantial discounts. As a result, Indu Craft ceased operations in November, 1987 and brought this action in the U.S. District Court for Southern District of New York invoking diversity jurisdiction, 28 U.S.C. §1332.

Indu Craft asserted claims for breach of the implied covenant of good faith and fair dealings in loan agreements, and for prima facie tort. The Bank counterclaimed, based on the Note. Trial was by jury. Indu Craft sought a jury instruction for punitive damages on the prima facie tort claim, but the trial court did not give any such instruction.

The jury found, A-104a, that the Bank reduced or effectively canceled Indu Craft's line of credit in bad faith and in an unfair manner to avenge Mehta's refusal to invest for the benefit of Chokshi's son. Further, it found that Indu Craft was substantially in compliance with the loan agreement. Accordingly, the jury found for Indu Craft on the first claim for breach of the implied covenant of good faith and fair dealing, and quantified damages at $3 million. But it reduced this sum by $1 million for failure to mitigate, and thereby brought in a net verdict for $2 million on this claim. A-105a-106a.

On the prima facie tort claim, the jury found that the Bank's and Chokshi's reduction/cancellation of Indu Craft's line of credit and refusal to open or amend letters of credit were vengeful, malicious and done solely to injure Indu Craft. Accordingly, it returned a verdict on this claim against the Bank and Chokshi, and awarded Indu Craft special damages of $1.25 million, A-111a.

On the Bank's counterclaim on the Note, the jury found that the Bank or Chokshi had wrongfully interfered with and prevented Indu Craft from fully repaying the Bank. Hence, verdict was for Indu Craft on this counterclaim, A-112a.

Judgment was entered accordingly on August 21, 1992, with pre-judgment interest being awarded at the New York rate (9%) to the day of entry. A-95a.

On December 17, 1993, the trial court granted the defendants' motion for setting aside the jury verdict and entering judgment for the Bank as a matter of law. The Court

held that Indu Craft had not proven damages, and dismissed the complaint. It also affirmed the jury verdict on the Bank's counterclaim, A-48a, and entered an amended judgment, A-78a.

Both sides appealed. On February 3, 1995, the Second Circuit reversed the trial Court, finding that the jury verdict was supported by the evidence. It reinstated the judgment favoring Indu Craft, but ordered that the amount due on the Note be offset therefrom, A-1a. On remand, the trial Court reduced the jury verdict by the principal amount of the Note and denied the Bank's application for interest and attorney's fees, A-80a. It awarded pre-judgment interest to August 21, 1992 (at 9%, the New York rate) to Indu Craft on the net balance of the jury award after the set off, entering a judgment in the amount of $2,268,865.43 on August 17, 1995, A-80a, 90a.

Indu Craft moved the Second Circuit to recall the mandate. On October 4, 1995, that Court directed the District Court to "award post-judgment interest at the applicable federal rate from August 21, 1992, the date of the original judgment in the trial court." A-18a. On October 19, 1995, an amended judgment in the amount of $2,519,822.29 was entered to include post-judgment interest from August 21, 1992 at the federal rate of 3.41 percent, A-97a.

Both sides appealed. But the Second Circuit affirmed the judgment, A-34a.

ARGUMENT

I. **By Reducing the Jury's Award Based on The Note (Upon Which The Jury Found No Liability), The Court Below Extended Its Reexamination Powers Under The Seventh Amendment In A Novel And Unprecedented Manner Which Should Be Reviewed By This Court.**

> An essential characteristic of [the federal judicial] system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, under the influence -- if not the command [footnote omitted] -- of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537 (1958). While an appellate court's authority to review jury verdicts under the Re-examination Clause of the Seventh Amendment is "large," Gaspirini v. Center For Humanities, Inc., ___ U.S. ___, ___, 116 S.Ct. 2211, 2222 (1996), it does not extend to substituting the court's own view of the facts for that of the jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"). Accordingly, our courts have uniformly sustained jury verdicts *absent* a "total failure of evidence," Parts & Elec. Motors, Inc. v. Sterling Electric, Inc., 826 F.2d 712, 720 (7th Cir. 1987); accord, United States v. Merritt Meridian Const. Corp., 1996 WL 501755 (2nd Cir. 1996); Electro Source, Inc. v. United Parcel Service, Inc., 1996 Wl 506915 (9th Cir. 1996); Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490 (8th Cir. 1996).

Here, the Second Circuit departed from this established law and practice in three major respects, thereby setting a precedent with potential for tremendous systemic damage. First, that Court held that the "evidence of the lost value of Indu Craft as a going enterprise, standing alone, would have been sufficient to support the jury's award of damages." A-14a. *Upon this holding, the Seventh Amendment mandated that the Court simply affirm the jury award.* Even if the Court could speculate on the jury's erroneous reasoning for the award, it could not reassess damages.[2] As this Court has held, "[J]uries are not bound by what seems inescapable logic to judges." Morissette v. United States, 342 U.S. 246, 276 (1952). Indeed, *as recently as **Gaspirini**, 116 S.Ct. 2211, this Court held that a federal appeals court could not, consistent with the Seventh Amendment, reduce a jury award in order to comply with State substantive law; that was the function of the trial court.*

The proper measure of damages is indisputably an issue of fact, St. Louis, I.M. & S.R. Co. v. Craft, 237 U.S. 648, 661 (1915). Indeed, the very existence of a damages remedy may be determinative of the *right* to a jury trial, Tull v. United States, 481 U.S. 412 (1987). By reassessing the damage award, the Second Circuit effectively recast the jury's factual findings. This was an unprecedented extension of its

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[2] That apart, the Second Circuit was substantively wrong: It recognized that the evidence which sustained the verdict *"already incorporates the necessary deduction of fixed and variable costs,* providing an accurate measurement of plaintiff's loss as adjusted for savings resulting from the breach." A-12a (emphasis added). Obviously, "fixed and variable costs" included the note at issue. Thus, the Court's ruling was based upon an impermissible double-counting and permitted a windfall to the Bank, contrary to the jury's verdict.

Reexamination powers, contrary to precedents going back to well over a century. See, e.g., Railroad Co. v. Fraloff, 100 U.S. 24, 31-32 (1879).

Second, the jury explicitly held that Indu Craft was *not* liable on the Note and denied any recovery on the Bank's counterclaim. A-7a. The Second Circuit did not fault this finding as unsustainable. Nevertheless, *that Court modified the jury's finding* -- nay, reversed it -- by ordering an "equitable setoff" based on the Note: If Indu Craft was not liable on the Note, as the jury held, the Note could not sustain any setoff. This was also a novel expansion of the Court's authority under the Re-examination Clause.

The Second Circuit's effective reversal of the jury's finding of no liability is also clearly contrary to well-settled precedent. *Indeed, even where a jury has found liability, this Court has held that the Seventh Amendment prohibited federal courts from increasing the damages*. As this Court explained over six decades ago,

> To hold [otherwise] is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'

Dimick v. Schiedt, 293 U.S. 474, 487 (1935). Dimick has been repeatedly approved. See, e.g., Gaspirini, 116 S.Ct. at 2222; Markman v. Westview Instruments, Inc., 116 S.Ct. 1384, 1390 (1996); Honda Motor Co. Ltd. v. Oberg, 512 U.S. 415, ___, 114 S.Ct. 2331, 2336 n.3 (1994). Surely, if an appeal court cannot *increase damages* by way of additur, it cannot *find liability* where none existed.

Third, Indu Craft was entitled[3] to have the jury decide the issue of punitive damages for prima facie tort. Curtis v. Loether, 415 U.S. 189 (1974) (punitive damages is issue for the jury); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278-79 (1989) ("In a diversity action, . . . the propriety of an award of punitive damages for the conduct in question, and the factors *the jury* may consider in determining their amount, are questions of state law," emphasis added). Indeed, the propriety of such instruction is amply borne out by the jury's finding of malice and liability on prima facie tort.

The trial court failed to instruct the jury as Indu Craft requested, and the Second Circuit did not address the issue. Cfr., Johnson v. Hugo's Skateway, 974 F.2d 1408, 1416 (4th Cir. 1992) (district court's failure to instruct jury on punitive damages warranted reversal); Benigni v. City of Hemet, 879 F.2d 473, 479 (9th Cir. 1988), reh'g denied, 882 F.2d 356 (9th Cir. 1989) ("A failure to submit a proper jury instruction is a question of law reviewable de novo . . ."). Thereby, Indu Craft was deprived of its Seventh Amendment right to have a jury determination of this issue.

Thus, the Court below departed from the usual course of judicial proceedings. By invading the province of the jury

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[3] New York law on the issue is clear and well-settled:

> the award of punitive damages . . . rests is the discretion of the jury. . . The basis for an award of exemplary damages depends upon a showing that the wrong is aggravated by evil or a wrongful motive or that there was willful and intentional misdoing, or reckless indifference equivalent thereto. . .

Mistral, Inc. v. Columbia Broadcasting System, 61 A.D.2d 491 (1st Dep't 1978).

while holding that the findings were fully supported by evidence, the Court took an unprecedented and novel view of its powers under the Seventh Amendment, and hence, certiorari is appropriate. Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 470 (1982) ("Because of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the Court of Appeals, we granted certiorari, . . ."); Pointer v. Texas, 380 U.S. 400, 401 (1965) (writ granted to consider the novel and important question of whether the Confrontation Clause of the Sixth Amendment is applicable to the states); United States v. Gouveia, 467 U.S. 180 (1984) ("novel application of our Sixth Amendment precedents").[4]

II. By Awarding Post-Judgment Interest In This Diversity Case Under Federal Law Instead of State Law, The Lower Court Decided An Important Federal Question That Has Not Been But Should Be Settled By This Court

A. The *Erie* Doctrine Requires That In Diversity Cases, Post-Judgment Interest Be Determined According To State Law

Under the Erie doctrine, diversity courts apply state substantive law and federal procedural law. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 79 (1938); accord, Byrd, 357 U.S. 933; Salve Regina College v. Russell, 499 U.S. 225 (1991). For determining whether a provision at issue is

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[4] he Second Circuit ordered this "equitable setoff" suo moto. Hense, the question of Indu-Craft's raising it before the lower court does not arise.

substantive or procedural, the "outcome-determination" test is applied. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). While applying this test, courts must be guided by Erie's twin purposes: "discouragement of forum-shopping and avoidance of inequitable administration of the law." Hanna v. Plumer, 380 U.S. 460, 468 (1965). As this Court reiterated recently,

> Just as the Erie principle precludes a federal court from giving a state-created claim "longer life . . . than [the claim] would have had in the state court," Ragan [v. Merchants Transfer & Warehouse Co.], 337 U.S [530] at 533 [1949], so Erie *precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.*

Gaspirini, 116 S.Ct. at 2221 (emphasis added). It follows that Erie also precludes a recovery that is significantly *less* than that in state court.

In Gaspirini, this Court considered the standard to be applied by federal courts sitting in diversity jurisdiction to review jury awards. State law directed state appeals courts to apply a "deviates materially" standard, as opposed to the traditional "shocks the conscience" standard applied in federal courts.

This Court reasoned that while the State law "contained a procedural instruction, . . . the State's objective is manifestly substantive." Id., at 2220. Should the federal courts ignore State law, "'substantial' variations between state and federal money judgments]' may be expected" implicating the "twin aims" of Erie. Id., at 2221. Hence, the diversity

court should respect the State's "dominant interest,"id. at 2224, and "must be guided by the damage-control standard" provided by State law, id., at 2225.

Thus, the lower courts should have respected New York's "Dominant Interest" in prescribing post-judgment interest. Judgment interest has always been considered an item of substantive damages, and hence, determined by State law in diversity cases. See, e.g., Budge v. Post, 643 F.2d 372, 375 (5th Cir. 1981); Jarvis v. Johnson, 668 F.2d 740, 746-47 (3d Cir.1982); Bauer v. Uniroyal Tire Co., 630 F.2d 1287, 1290 (8th Cir.1980); Casto v. Arkansas-Louisiana Gas Co., 562 F.2d 622, 625 (10th Cir.1977); Restatement (Second) of Conflict of Laws §171 comment C (1971). "[T]he purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 835 (1989) (citation omitted).

New York law provides for post-judgment interest at 9%, CPLR 5003, 5004, which is significantly higher than the variable federal rate. Clearly, under the circumstances, "substantial variations" in the recovery pursuant to federal and state money judgments are much more than expected; they are inevitable.

B. Refusal to Apply State Law Will Lead To Forum Shopping And To Inequitable Administration of Justice

This Court has zealously applied state law in furtherance of the twin aims of Erie. See, e.g., Walker v. Armco Steel Corp., 446 U.S. 740 at 753 (1980) (whether

filing of a complaint or service tolls the statute of limitation); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202-04 (1956) (enforceability of arbitration provision in contract); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 at 555-556 (1949) (requirement of indemnity bond for litigation expenses in derivative actions); Sun Oil Co. v. Wortman, 108 S.Ct. 2117 (1988) (adoption of Kansas's statute of limitation); Zicherman v. Korean Air Lines Co., 116 S.Ct 629, 634 (1996) ("It does not seem to us that the question of who is entitled to a damages award is procedural").

Clearly, the rate of post-judgment interest in cases governed by substantive State law should be the same in state and federal courts. Rejection of State law on interest in diversity cases would lead to forum-shopping and inequitable administration of justice. Since the federal rate has been lower than the New York rate for several years now (since mid-1989), non-resident defendants are encouraged to shop for more favorable law by removing to federal court. This factor, by itself, suffices to warrant application of state law. Walker, 446 U.S. at 753 (failure to meet one part of the twin-aims test suffices to warrant application of state law).

This reasoning has been followed uniformly. For example, in S.A. Healy Company, v. Milwaukee Metropolitan Sewerage District, 60 F.3d 305 (7th Cir. 1995) -- cited approvingly in Gaspirini, 116 S.Ct at 2220 n.7 -- the Seventh Circuit applied Wisconsin's rule of double taxing costs and awarding interest at 12% *until satisfaction of judgment* where plaintiffs' offer of settlement were rejected. Otherwise, Judge Posner reasoned, defendants would have a "strong incentive to forum-shop and remove these cases to federal courts." See also Mangold v. California Public Utilities Commission, 67

F.3d 1470 (9th Cir. 1995) (Since the availability of a multiplier for attorneys' fees in state court and not in federal court would lead to forum shopping and inequitable administration, State law applied even where diversity jurisdiction not involved); Trierweiler v. Croxton and Trench Holding Corporation, 90 F.3d 1523, 1538 (10th Cir. 1996) (Colorado rule requiring Certificate of Review before filing actions against professionals applied in diversity case to prevent forum-shopping and inequity).

C. Serious Questions Over The Interpretation Of The Amended Federal Post-Judgment Interest Statute Should Be Settled By This Court

Congress may legislate in traditional state-regulated areas, but courts have always assumed that "Congress does not exercise [this power] lightly." Gregory v. Ashcroft, 501 U.S. 452 (1991). Further,

> To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, *we must be "absolutely certain" that Congress intended such displacement* . . .

Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S.Ct. 834, 848 (1995) (emphasis added). Moreover, Congress is assumed to know of judicial interpretation of a statute and "to adopt that interpretation when it reenacts a statute without change." Lindahl v. Office of Personnel Management, 105 S. Ct. 1620, 1628 n.15 (1985).

Under these principles, Section 1961 cannot govern the post-judgment interest rate in diversity cases. Prior to its amendment in 1982, federal courts uniformly applied state law for determining post-judgment interest. See, e.g., Home Life

Ins. Co. v. Equitable Equipment Co., Inc., 694 F.2d 402, 404 (5th Cir.1982); Affiliated Capital Corp. v. City of Houston, 793 F.2d 706, 709 nn. 3 & 5 (5th Cir. 1986) (en banc); Davis & Cox v. Summa Corp., 751 F.2d 1507, 1522 (9th Cir. 1985). Congress is assumed to have been aware of this interpretation.

Nevertheless, while amending the statute, Congress said nothing about diversity cases. The "new statute maintains the same language as the prior statute except for providing a federal rate of interest, and neither the statute nor the legislative history mention diversity actions despite the long line of cases holding that judgment interest is a matter of substantive law . . ." Weitz Co., Inc. v. Mo-Kan Carpet, Inc., 723 F.2d 1382, 1387 (8th Cir. 1983) (per Swygert J. (dissenting)); accord, Lazzara v. Esser, 622 F. Supp. 48 (N.D. Ill. 1985); Freedline v. Luxemburg, 682 F. Supp. 311 (M.D. Louisiana 1988).[5]

Hence, the pre-existing interpretation of 1961 should continue to be good law. However, some courts have disagreed and applied 1961 to diversity cases also. Weitz, 723 F.2d 1382; G.M. Brod & Co., Inc. v. U.S. Home Corp., 659 F.2d 1526 (11th Cir. 1985); Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 623-24 (5th Cir. 1988).

Reading Section 1961 narrowly, i.e., to apply only to non-diversity cases, would also avoid a major constitutional question. This is consistent with well-settled law. Lucas v. Alexander, 279 U.S. 573, 577 (1929) (a law "must be

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[5] In Kaiser, 494 U.S. 827, this Court interpreted Section 1961 in the context of a non-diversity case. Obviously, no Erie question was involved.

construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity"); accord, Miller v. Johnson, 115 S.Ct. 2475, 2493 (1995); Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2237 (1995).

Thus, for example, in Bernhardt, 350 U.S. at 201-2, this Court narrowly construed the Arbitration Act to apply only to transactions involving commerce and maritime activities. It explained:

> If respondent's contention is correct, a constitutional question might be presented. *Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.... Our view ... is that § 3 so read, would invade the local law field. We therefore read § 3 narrowly to avoid the issue.

350 U.S. at 202. See also Walker, 446 U.S. at 748-53 (narrowly construing Fed.R.Civ.P. 3 and avoiding constitutional question).

Thus, Section 1961 ought to be read so as to apply only to non-diversity cases. As the Fifth Circuit observed in Affiliated Capital, 793 F.2d at 709 n. 5,

> *** In *Massachusetts Benefit Assn. v. Miles*, 137 U.S. 689, 691 (1890) the Supreme Court held that the federal interest statute, "while providing only for interest upon judgments, does not exclude the idea of a power in the several States to allow interest upon verdicts, and, where such allowance is expressly made by State statutes, we consider it a right given to a successful plaintiff... The courts of the State and the Federal Courts sitting within the State should be

> in harmony upon this point." After *Erie,* 304 U.S. 64 (1938), the Supreme Court quoted *Miles* with approval and stressed that the allowance of interest on verdicts should be the same in state and federal courts in diversity cases. *See Klaxon,* 313 U.S. at 497.

Such a construction would avoid the major constitutional question of Congress's underlying power to legislate. This important issue of federal law should be decided by this Court.[6] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (important question of whether the constitutional exclusionary rule applies to certain types of forfeiture proceedings); Bruen v. Pfeifer Transportation Co., 361 U.S. 129, 130 (1959) (decision below "seemed to be out of line with the authorities"); Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 733 (1982) (decision "appeared to be in conflict with our precedents").

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[6] While this issue was not squarely addressed before the lower court, the significance and the frequency of its invocation calls for a pronouncement from this Court. Indeed, this Court has, on similar appropriate occasions, decided cases even on an *unargued* theory. Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990); Erie, 304 U.S. at 77-78 (overruling Swift v. Tyson, 16 Pet. 1 (1842) as unconstitutional); see also Erie, 304 U.S. at 82 (Butler, J.) (pointing out that no constitutional question was argued or briefed either in t his Court or the court below). Moreover, the issue is purely legal, which "mitigates the force of the considerations underlying the policy of refusing to consider issues not raised below." Trierweiler, 90 F.3d at 1538.

III. The Second Circuit's Decision That Post-Judgment Interest Begin from the Date of a Judgment Which Had Been Vacated by Both the District Court and Itself Is In Conflict with Decisions of the 5th, 9th, and District of Columbia Circuits and with Relevant Decisions of this Court

A. The decision below conflicts with those of the Fifth, Ninth and District of Columbia Circuits.

The decision below is in conflict with two different lines of decisions: that taken by the 5th and 9th Circuits, and that taken by the District of Columbia Circuit. Thus, in Turner v. Japan Lines, Ltd., 702 F.2d 752, 757 n. 7 (9th Cir., 1983) (emphasis added), the Ninth Circuit observed:

> Of course, in those cases where an earlier judgment in favor of plaintiff is vacated on appeal and a new verdict or decision for plaintiff is rendered in a District Court on remand, *interest under §1961 should properly run only from the date of entry of the new judgment and not from that of the old judgment, since the new verdict or decision presumably will include the value of loss of use of the money judgment from the date of loss up to the date of the new verdict on remand.*

This is based on the sound reason that a decision vacated by an appellate court has no legal effect and cannot spawn any legal consequences. Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 997 (9th Cir. 1990).

Similarly, the Fifth Circuit ruled in Falcon v. General Telephone Co., 815 F.2d 317, 320 (5th Cir. 1987) that a vacating of judgment, even when the original finding of fact is

not disturbed, has the effect of taking away "from any precedential effect."[7]

A different approach has been taken by the District of Columbia Circuit, narrowly confining the term "judgment" in § 1961 to a final judgment under Rule 54(b), Fed. R. Civ. P. In Hooks v. Washington Sheraton Corp., 642 F.2d 614, 616 (D.C. Cir., 1980), that Court permitted interest to run only from the date of a final judgment under Rule 54 (b), even though a judgment had actually been entered under Rule 58 over 14 months earlier. The Ninth Circuit has sided with the dissenting opinion in Hooks, Turner, 702 F.2d at 757 n.6.

These decisions purport to follow Kaiser, where this Court held that interest should not be calculated from the date of a legally insufficient judgment, 494 U.S. at 834. There, this Court also noted that since the original judgment on damages was unsupported by evidence, damages had not been ascertained in any meaningful way, id. at 836.

The Second Circuit attempted to distinguish Kaiser from this case on the ground that the factual findings of the jury here had not been disturbed on appeal. *But the jury's factual findings here were disturbed on appeal* -- as seen

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[7] The Fifth Circuit had earlier ruled that interest should attach from the date of the first judgment unless the appellate court mandate alters the judgment in more than relatively minor respects, Reaves v. Ole Man River Towing, Inc., 761 F.2d 1111, 1113 (5th Cir., 1985), in partial reliance upon a Tenth Circuit decision [Ashland Oil, Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir., 1979)] holding that in view of the extent to which the case was reversed, the appropriate date was that the judgment of the district court entered upon remand. Reaves has been followed by the Seventh Circuit in Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1211 (7th Cir., 1989).

above, the jury verdict of no liability on the Note was undermined and effectively nullified. The Second Circuit allowed the Note as an equitable offset, reducing the judgment (without interest) from $3.5 million to $1.8 million. Thus, the original damages were not ascertained in any meaningful way by the judgment used as the date for the running of post-judgment interest -- indeed, the damages were cut down by half. Whether or not there was evidentiary support for the findings, the damages awarded were significantly lower than under the first judgment. Hence, "it would be counterintuitive, to say the least, to believe that Congress intended post-judgment interest to be calculated from such a judgment," Kaiser, 494 U.S. at 836.

No doubt can exist that had the Second Circuit ordered a new trial, the 1992 judgment would not have been deemed meaningful. The fact that a new trial was avoided by unilaterally allowing the Bank's counterclaim as a set-off simply had nothing to do with the "meaningfulness" of the 1992 judgment. Half of that judgment -- the disallowance of the Bank's counterclaim – was now rendered ineffectual, with interest to run not on the original jury award, but only on the difference between the amount to plaintiff awarded by the jury and the Bank's set off awarded by the Second Circuit. Since the judgment of the Court of Appeals was significantly different in amount, and in theory, from the 1992 judgment, such earlier judgment was no longer meaningful.

In any event, the decision below clearly conflicts with the decisions of the 5th, 9th and District of Columbia Circuits and has decided an important federal question in a way that conflicts with the relevant decisions of this court in United States v. Munsingwear, 340 U.S. 36, 41 (1950) and Kaiser.

B. **The decision below conflicts with the most recent decisions of the Circuits Which Held that the test is the degree to which the judgment was upheld or invalidated on appeal.**

Kaiser opened up a battle in each case as to what is a "meaningful" decision. Thus, in Dunn v. Hovin, 13 F.3d 58 (3d Cir., 1993), the Third Circuit distinguished Kaiser on the ground that there had been a remittitur merely reducing the award; part of the original damage award was affirmed. In Kaiser the entire damage verdict had been overturned.

Three other circuits have held when post-judgment interest should run turns on the degree to which the judgment was upheld or invalidated on appeal. Lougham v. Consol-Pennsylvania Coal Co., 6 F.3d 88, 96 (3d Cir. 1993); H. J., Inc. v. Flyght Corp., 925 F.2d 257, 261-2 (8th Cir. 1991); Cordero v. De Jesus-Mendez, 922 F.2d 11, 17 (1st Cir. 1990).

We have been unable to find any case in which post-judgment interest was held to commence from the date of the original judgment, as here, when the trial court has itself vacated the original judgment, and the appellate court has, as here, *reversed* the judgment of the district court and modified the jury's findings.[8] When an appellate court reinstates a vacated judgment, as here, the rule is "that interest accrues from the date of the judgment on remand." De Long

[8] The cases typically arise by the granting of a judgment n.o.v. from which an appeal is taken. We thus have been unable to find any case linking the accrual of post-judgment interest to a judgment which has been vacated by both t he district court and a Court of Appeals.

Equipment v. Washington Mills Electro, 997 F.2d 1340, 1341 (11th Cir., 1993). Yet that Court held that when a jury verdict for the plaintiff is reinstated, equity commands that interest be awarded from the date of the original judgment. No state-mandated pre-judgment interest was available in that jurisdiction. Thus, appellate courts' rulings in this area appear to be predicated on what equity requires-*e.g.*, De Long and Dunn.

Equity is apparently sought by having post-judgment interest kick in at the earliest time so as not to penalize the plaintiff. But where state law provides for pre-judgment interest, the plaintiff is completely protected by having pre-judgment interest (here at 9%) and is hurt by such an early application of federal post-judgment interest (here 3.41%). The cases have developed, and are developing, rules in districts where there is apparently no provision for pre-judgment interest, or it is otherwise unavailable -- and these should not be automatically applicable to cases in jurisdictions where, as here, pre-judgment interest is available. Totally different equitable considerations come into play. We urge, as another reason for granting certiorari here, that this Court examine whether the rules being evolved for cases where there is no pre-judgment interest available should be applied, without further thought, to cases wherein pre-judgment interest is available.

Kaiser has produced no panacea. But in determining what is a meaningful decision in the context of no pre-judgment interest being available, the same standards cannot logically apply to cases where pre-judgment interest is available. There is now great danger that, as here, a standard developed to equitably protect a plaintiff will be applied to a

situation where it will protect a defendant, albeit inequitably.

To equitably protect a plaintiff from the running of post-judgment federal interest under the statute, who otherwise would have the protection of the more generous state rate of interest, further analysis should be had of the effect and use of the 52 week T-bill as the provider of the post-judgment interest rate. Such rates are notoriously lower than those of commercial bonds, both because of their 100 percent security and their tax advantages -- neither of which is helpful to a successful plaintiff who must, under 1961, take the discounted T-bill rate, and thus cannot be made whole.

The requirement of 1961 that the rate be that settled immediately prior to the date of the judgment presents yet further difficulties in making the plaintiff whole, as exemplified by this very case. By ruling that the "judgment" within the meaning of § 1961 was the 1992 judgment, Indu Craft was stuck with the 1992 applicable low rate of 3.41 percent rather than the 5.67 percent rate existent when the Court of Appeals modified and reinstated the 1992 judgment in 1995-and stuck with this lower rate for ever after. Indu Craft certainly was not made whole by this picayune rate of interest and certainly could not have borrowed money elsewhere at this rate.

Does it not follow that where the state law at issue provides for pre-judgment interest at a substantially higher rate than that prescribed by the federal law, the only equitable rule to make a plaintiff whole would be to allow pre-judgment interest until the last meaningful judgment? Post-judgment interest under section 1961 ought to apply after this date.

Such issues are worthy of full briefing and oral argument. This Court should examine this case so as to avoid a rule of equity being turned into an instrument of inequity.

IV. Since the Mandate of the Court of Appeals Governs the Allowance of Interest, it Was Unnecessary to Preserve the Point That Pre-Judgment Interest Should Have Been Compounded

Under New York law, a court may compound interest if it determines that the defendants acted in bad faith. As was ruled in Wilson v. Great American Industries, Inc., 763 F. Supp. 688, 691 (N.D.N.Y., 1991), after remand from the Second Circuit:

> Pursuant to the provision in New York Civil Practice Law and Rules § 5004 that "[i]nterest [upon judgments] shall be at the rate of nine per centum per annum . . . ," this court finds that this is the appropriate rate of interest in this case. Such interest may be compounded if the court determines that the defendants acted in bad faith. *See Matter of Revson,* 86 A.D. 2d 872, 447 N.Y.S. 2d 297, 302 (2d Dept. 1982) (citing *Brown v. Knapp,* 79 N.Y. 136, 145). Since the Second Circuit found that the defendants acted fraudulently with respect to the plaintiffs, this court, in its discretion holds that compound interest is appropriate under these circumstances.

Rule 37, Fed. R. App. P., requires the mandate of the appellate court to contain instructions with respect to allowance of interest when, as here, a judgment was modified or reversed with a direction that a judgment for money be entered in the district court. Hence, the failure to have

preserved this question at the district court level cannot derogate from the petitioner's right to call upon the Court of Appeals for compounding of interest. Such interest is clearly allowable under New York law, the jury having found that the defendants acted in bad faith.

V. The Court's Decision to Reject the Proffered Jury Charge on Punitive Damages on the Prima Facie Tort Claim Was in Conflict with Relevant Decisions of the 4th and 9th Circuits, New York Appellate Courts, and Relevant Decisions of this Court

Indu Craft sought jury instructions for punitive damages on the prima facie tort claim. Without explanation, the trial court refused to deliver any charge in this regard, and the Second Circuit approved this refusal implicitly. This decision was in conflict with (a) Curtis, 415 U.S. 189, and Browning-Ferris, 492 U.S. 257, which held that punitive damages was an issue for the jury; (b) Johnson, 974 F.2d 1408, and Benign, 879 F.2d 473, which held that failure to give a properly submitted charge to the jury warranted reversal; and (c) New York appellate decisions, e.g., Walker v. Sheldon, 10 N.Y. 2d 401, 404-5 (1961); Le Mistral, 61 A.D. 2d at 495, which permit punitive damages for prima facie tort. Hence, certiorari should be granted to resolve this conflict.

CONCLUSION

This court should grant certiorari, and amend the judgment to provide that the jury award of $3.25 million for Indu Craft be reinstated in full; that post judgment interest be awarded under New York law, or alternatively, from the entry of the 1996 judgment; and that pre-judgment compound interest run until that date. The matter should also be remanded to the district court for a trial on the issue of the amount of punitive damages.

Respectfully submitted,

Krishnan Shanker Chittur
Attorney for Petitioner

Dated: New York, NY
October 9, 1996

Appendix A - Opinion of the United States Court of Appeals, Decided February 3, 1995 [Pages 1a - 17a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 210, 330—August Term 1994

(Argued September 2, 1994 Decided February 3, 1995)

Docket Nos. 94-7089, 94-7127

INDU CRAFT, INC.,

Plaintiff-Appellant-Cross-Appellee,

—v.—

BANK OF BARODA,

Defendant-Appellee-Cross-Appellant, Counterclaim-Plaintiff,

KRISHNAKANT C. CHOKSHI,

Defendant-Appellee.

Before:

KEARSE, CARDAMONE, and PIERCE,

Circuit Judges.

Appendix A

Plaintiff Indu Craft, Inc. appeals from the grant in part, and defendant Bank of Baroda cross-appeals from the denial in part, of a judgment as a matter of law pursuant to Fed. R. Civ. P. 50 entered in the United States District Court for the Southern District of New York (Bernikow, M.J.) following a four-week jury trial.

Reversed and remanded.

PETER J. SCHMERGE, New York, New York (Jonathan A. Chase, Michele C. Petitt, Eaton & Van Winkle, New York, New York, of counsel), *for Appellant Indu Craft, Inc.*

FRANK H. PENSKI, New York, New York (Nixon, Hargrave, Devans & Doyle, New York, New York, of counsel), *for Appellees Bank of Baroda and Krishnakant C. Chokshi.*

CARDAMONE, *Circuit Judge*:

Plaintiff Indu Craft, Inc. appeals and defendant Bank of Baroda cross-appeals from a judgment of the United States District Court for the Southern District of New York, Bernikow, Magistrate Judge, granting in part and denying in part the Bank's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 after a four-week jury trial in an action based on a revolving credit agreement between Indu Craft and the Bank. Krish-

nakant C. Chokshi, an officer of the Bank, was also named as a defendant. Under the agreement the Bank would make advances to and issue letters of credit on behalf of Indu Craft for the purpose of financing its business. When Indu Craft refused to make an investment for the benefit of Chokshi's son, the Bank reduced Indu Craft's line of credit and took other steps that effectively drove it out of business.

Plaintiff filed suit against the Bank in October 1987, alleging three causes of action, only two of which are relevant to this appeal. The first of these causes of action was that the Bank breached its covenant of good faith and fair dealing implied in the revolving credit agreement; the second cause of action alleged that the Bank and Chokshi committed a *prima facie* tort against plaintiff. The Bank counterclaimed for approximately $1.7 million that Indu Craft still owed it under the line of credit loan. The action was referred for all purposes to the magistrate judge, where a jury trial was held. The jury returned a $3.25 million verdict in plaintiff's favor on the contract and *prima facie* tort causes and a verdict also in its favor on the Bank's $1.7 million counterclaim. The Bank then moved for judgment as a matter of law or, in the alternative, for a new trial with respect to both verdicts.

The magistrate judge, in a ruling that is the subject of this appeal, held that neither of Indu Craft's contract and tort causes of action could stand. While it found Indu Craft had shown a breach of the implied covenant of good faith, it also believed plaintiff had failed to prove damages and that the tort damages returned by the jury were duplicative of the contract damages. This ruling wiped out plaintiff's $3.25 million jury verdict. The magistrate judge at the same time denied the Bank's motion for judgment on its $1.7 million counterclaim

against plaintiff because, as it stated, the Bank had prevented Indu Craft from performing under the note.

In our view the magistrate judge wrongly deprived plaintiff of its $3.25 million jury verdict on its contract and tort causes of action, and also wrongly denied the Bank's motion for judgment on its $1.7 million counterclaim, perfectly illustrating the accuracy of the proverb that "two wrongs don't make a right."

BACKGROUND

Indu Craft is a New York corporation that imported ladies' sportswear from the Far East and sold those goods at wholesale in the United States. Its founder, president and sole shareholder was Hemant C. Mehta. The business involved placing orders for garments with plaintiff's foreign suppliers and promptly arranging for the issuance of letters of credit in their favor. The letter of credit guaranteed the manufacturer of the goods that it would be paid when the garments were shipped. In those foreign countries where Indu Craft's suppliers were located, letters of credit were needed by manufacturers to ensure compliance with quota restrictions on exports. Normally, suppliers will not ship—and sometimes will not even begin to manufacture—garments until they receive a letter of credit. Because the garment industry is, by its very nature, seasonal, delay is very detrimental in selling a line of clothes. Due to this time factor, a delay in the issuance of a letter of credit inevitably results in a slowdown of production or a holding up of the shipment of merchandise, causing a concomitant loss of business.

As a result of the good relationships between Indu Craft and its suppliers, and contrary to industry practice,

its manufacturers often began production of garments relying on the assurance that a letter of credit would be speedily forthcoming. Swift delivery was a critical element in Indu Craft's success, enabling its merchandise to appear in American retail stores earlier than its competitors' garments. The benefit of timeliness increased initial sales and created generally more profitable reorders.

Indu Craft's relationship with the Bank began in 1983 when it was granted a $500,000 line of credit. The line of credit was periodically increased, reaching $2.7 million in December 1986. The line then included an overdraft facility of $1.2 million. During this period the relationship between plaintiff and defendant was marked by informality. In some instances credit was increased despite a decline in Indu Craft's sales or its failure to realize sales projections. On numerous occasions plaintiff was permitted to exceed its line of credit overdraft limit, sometimes by as much as 40 percent. Further, the Bank typically granted applications for letters of credit within 24 hours of application. This ready access to credit gave Indu Craft an ability to have its merchandise manufactured and shipped quickly to the United States.

The connection between plaintiff and defendant began to wear thin in November 1986 following a discussion in which Chokshi suggested that Mehta invest in a computer business for the benefit of Chokshi's son, Anil. After evaluating this proposal Mehta determined not to invest and informed Chokshi and Anil of his decision in February 1987. A month later the Bank demanded that Indu Craft immediately reduce its $1.3 million overdraft to its pre-set limit of $1.2 million. Defendant then informed plaintiff, without prior notice, that its line of credit had been reduced from $2.7 million to $2.3 mil-

lion and the overdraft sublimit reduced from $1.2 million to $1.0 million. Chokshi conceded at trial that he had falsely informed Indu Craft that this reduction was directed by the Bank's central office in Bombay, India, when in fact the central office had no knowledge of the reduction.

After Mehta's rejection of the proposal to invest in the computer business for Anil Chokshi, further letters of credit were substantially delayed, if issued at all. The Bank also began to demand that applications for such letters be backed by confirmed orders from 100 percent of Indu Craft's customers. That requirement had never before been imposed, and it was not then imposed on other Bank customers seeking letters of credit. Defendants knew that commercial practices in the garment industry made a requirement of confirmed orders commercially impossible to comply with. No letters of credit were issued to Indu Craft after May 4, 1987.

From April through September 1987 Indu Craft complained to the Bank's central offices about the curtailment of its credit and the difficulties it was experiencing obtaining letters of credit. Numerous Bank officers repeatedly told plaintiff that its credit would be restored and its difficulties solved. Nonetheless, because of the delays and refusal by the Bank to issue new letters of credit, Indu Craft's suppliers stopped producing goods and delayed shipment of those goods they did produce. Garments arrived late and had to be sold at substantial discounts. As a result, Indu Craft ceased operations in November 1987 and brought the instant action against the Bank.

At trial the jury found the Bank's actions were not taken in good faith but grew out of Mehta's refusal to

invest in the computer business for Anil Chokshi and thus violated the covenant of good faith and fair dealing implied in the loan documents. The jury also found the Bank and Chokshi acted with malice to injure Indu Craft and that such action constituted a *prima facie* tort. Plaintiff was found by the jury to have been damaged in the amount of $3 million on its contract claim, but it was also found to have failed to mitigate $1 million of this amount. In addition, the jury awarded plaintiff $1.25 million on its *prima facie* tort claim. Prior to being discharged, the jury was polled and stated it was their intention that the cumulative award to Indu Craft be $3.25 million. On the Bank's counterclaim for the $1.7 million due on the note, the jury concluded that the Bank had wrongfully interfered and prevented Indu Craft from repaying the loan and thereby denied the Bank any recovery on its counterclaim.

When, as noted earlier, the Bank moved for judgment as a matter of law contending that all the jury verdicts should be overturned as a matter of law, the magistrate judge found that although plaintiff had proven the loss of value of its business as a going concern, it had failed to produce proof of its variable expenses and fixed costs. Thus, the magistrate concluded plaintiff had failed to prove lost profits, requiring a judgment dismissing the jury's contract damages award. The magistrate also vacated the *prima facie* tort award on the grounds that it was duplicative of the contract damages award. The magistrate upheld the jury's verdict on the Bank's counterclaim, observing that the Bank's actions taken in bad faith wrongfully prevented Indu Craft from repaying the note.

Indu Craft appeals the grant of judgment as a matter of law with respect to its contract and tort causes of action and the Bank appeals the denial of judgment with respect

to its counterclaim. For the reasons stated below we reverse and remand with directions to the magistrate judge to reinstate the jury verdicts on plaintiff's contract and tort causes of action, and also reverse the denial of defendant's motion for judgment on its counterclaim and remand for the magistrate judge to grant that motion.

DISCUSSION

We discuss briefly at the outset our scope of review from a grant or denial of judgment as a matter of law. On appeal, we apply the same standard as the trial court, determining whether "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.' " *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)). Our review is *de novo*. *See Fiataruolo v. United States*, 8 F.3d 930, 938 (2d Cir. 1993); *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992). We turn to an analysis of the merits.

I Contract Award

The magistrate judge determined that Indu Craft presented sufficient evidence to prove the loss of its value as an ongoing business. It also determined that plaintiff's evidence of lost profits failed to take into account variable and fixed costs and was therefore insufficient as a matter of law. Faced with adequate proof of the lost value of the business and inadequate proof of lost profits, the trial court nonetheless granted judgment as a

matter of law in favor of the Bank. While we agree with the magistrate judge's conclusions regarding the sufficiency of the proof regarding loss of value and the insufficiency of the lost profits evidence, we are unable to adopt the trial court's view that the evidence, as a whole, failed to support the jury's damages award.

A. *Proof*

We summarize the evidence presented to support these two methodologies of proving loss. Plaintiff's owner, Mehta, testified at trial regarding the calculation of lost profits, which proof was contained in a four volume document admitted into evidence. It furnished factual information on cost of goods sold and sales prices received to establish gross profits for these same goods. With respect to goods whose delivery was delayed, the document and summary sheets reflected the actual costs and actual sales to arrive at one component of lost profits. With respect to goods never imported, the exhibit projected the costs of the goods and projected sales to arrive at the other component of lost profits. These were added together to arrive at gross lost profits of approximately $2.6 million.

Indu Craft's expert witness, Bernard Augen, testified as to a valuation of Indu Craft's business. Valuation began with Indu Craft's stated earnings from its 1986 fiscal year, which were used to project earnings for fiscal 1987. Augen testified that fiscal 1986 earnings were used because earnings in fiscal 1987 were affected by a non-recurring event, an embargo of a country from which Indu Craft imported garments. The exclusion of non-recurring events was referred to as "normalizing." Augen then assumed earnings growth from fiscal 1986 to fiscal 1987 based on Indu Craft's historical earnings

growth and multiplied this number by an earnings multiplier—based on earnings of publicly traded companies in the apparel industry—to arrive at a range of values for plaintiff's business.

Augen stated that apparel companies had multipliers ranging from 5.2 to 11. Due to Indu Craft's small size relative to publicly traded companies, multipliers at the low end of the range were used. Using this valuation process the expert witness arrived at values for Indu Craft ranging from $3.3 million to $5 million, with a mid-range of $4.3 million.

B. *Law of Damages*

We begin analysis of this proof by noting that "[t]he general rule for measuring damages for breach of contract has long been settled. It is the amount necessary to put the plaintiff in the same economic position he would have been in had the defendant fulfilled his contract." *Adams v. Linblad Travel, Inc.*, 730 F.2d 89, 92 (2d Cir. 1984); *see also* 5 Arthur L. Corbin, *Corbin on Contracts*, § 992, at 5 (1964); 11 Samuel Williston, *A Treatise on the Law of Contracts*, § 1338, at 198 (3d ed. 1968). In implementing this general rule, we have stated that when computing damages for a defendant's wrongful conduct, "if any benefit or opportunity for benefit appears to have accrued to the plaintiff because of the breach, a balance must be struck between benefit and loss, and the defendant is only chargeable with the net loss." *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 852 (2d Cir. 1987) (*quoting Stern v. Satra Corp.*, 539 F.2d 1305, 1311-12 (2d Cir. 1976)).

These precepts require that revenues due a plaintiff because of a breached contract must be offset by any amount plaintiff saved as a result of the breach. In the

typical contract action such an offset usually consists of variable costs, that is, those costs that would have been incurred solely as a result of performance under the contract. *See, e.g., Linblad Travel*, 730 F.2d at 92-93. But when the breach brings an end to a plaintiff's business the sums to be offset may often include, in addition, fixed costs. Fixed costs are those expenses that would have been incurred as a result of the overall operation of a business, including overhead such as rent, utilities, insurance, salaries and the like.

C. *Resolution of Damages Proof*

Indu Craft concedes that it proffered no evidence with respect to fixed costs. Decisional law analyzing the role of fixed costs in damages calculations is sparse since most breaches of contract in a business setting do not result in the termination of a business. Plaintiff relies on our decision in *Linblad Travel*, 730 F.2d at 93, for its view that overhead costs need not be deducted from income to calculate damages. That reliance is misplaced. *Linblad* determined that fixed costs should not have been included in the damages calculation where plaintiff was an ongoing business whose fixed costs were not affected by the breach. *Id.*

In the present case, plaintiff's cessation of business may very well have reduced or eliminated fixed overhead costs. Such savings, resulting from the Bank's breach, are properly offset from lost profits. Hence, the failure to deduct fixed costs when utilizing lost profits to calculate damages renders such measurement too imprecise for judicial use. However, proof of lost profits is but one method of proving the amount necessary to restore plaintiff to the economic position he would have been in absent the breach. An alternative methodology, extrap-

olating the value of a business as an ongoing entity from the company's past earnings, establishes a plaintiff's damages without suffering the same defect. By resorting to past earnings, this methodology already incorporates the necessary deduction of fixed and variable costs, providing an accurate measurement of plaintiff's loss as adjusted for savings resulting from the breach.

In fact, when the breach of contract results in the complete destruction of a business enterprise and the business is susceptible to valuation methods, such an approach provides the best method of calculating damages. *Cf. Sharma v. Skaarup Ship Management Corp.*, 916 F.2d 820, 825 (2d Cir. 1990) ("where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages"), *cert. denied*, 499 U.S. 907 (1991). The methodology of determining a business's earnings and applying an earnings multiplier to fix the value of a business that was completely terminated is one we have approved. *See Lamborn v. Dittmer*, 873 F.2d 522, 533-34 (2d Cir. 1989).

The Bank attacks various aspects of the testimony offered by the plaintiff's expert. To the extent he departed from general valuation practices or adopted procedures subject to criticism, defendant had ample opportunity to elicit these facts and argue them to the jury. The expert's training and background and the procedures he followed in arriving at a valuation presented the jury with the question of whether or not to accept the expert's opinion and what weight to give it. *See Enercomp, Inc. v. McCorhill Pub., Inc.*, 873 F.2d 536, 550 (2d Cir. 1989).

Further, when reviewing the sufficiency of the damages evidence, we are guided by the principle that if a plaintiff has shown it more likely than not that it has suffered damages, the amount of damages need only be proved with reasonable certainty. *See W.L. Hailey & Co. v. County of Niagara*, 388 F.2d 746, 753 (2d Cir. 1967) (collecting New York cases). New York has long had an established rule that:

> [W]hen it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain.

Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 209 (1886); *see Randall-Smith, Inc. v. 43rd St. Estates Corp.*, 17 NY2d 99, 105-06 (1966). The wrongdoer must shoulder the burden of the uncertainty regarding the amount of damages. *See Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d Cir. 1977). Indu Craft's proof of value of its business as a going concern was adequate to meet these tests for sufficiency.

After expressly finding that plaintiff's proof of lost value was sufficient, we are at a loss as to why the trial court then set aside the jury award. The jury's special verdict sheet made no distinction between the two methods of proving damages, and the figures were well within the range testified to by plaintiff's expert who set a low value of $3.3 million and a mid-range of $4.3 million. The jury found that Indu Craft was damaged in a total amount of $4.25 million, less $1 million for a fail-

ure to mitigate, for net total damages of $3.25 million. Had lost profits evidence not been presented, evidence of the lost value of Indu Craft as a going enterprise, standing alone, would have been sufficient to support the jury's award of damages. Hence, the judgment as a matter of law with respect to the contract claim must be reversed and the jury award reinstated, although the award must be modified as we discuss in a moment.

II *Prima Facie* Tort Award

We pass now to discussion of the grant of the motion for judgment as a matter of law setting aside the *prima facie* tort jury award. That award was amply justified by the proof. The Bank and Chokshi engaged in deliberate delay in issuing letters of credit and made an unprecedented demand only on plaintiff that such letters be backed by confirmed orders from all of plaintiff's customers. Their conduct ultimately drove Indu Craft out of business. The jury was entitled to find that this web of wrongdoing was not woven by innocent hands. Clearly the same wrongdoing also served as the basis for the jury finding that defendants intentionally acted with malice and without excuse to injure Indu Craft, thereby committing a *prima facie* tort against plaintiff. *See Freihofer v. Hearst Corp.*, 65 NY2d 135, 142 ("Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful." (internal quotes omitted)).

As pointed out above, the jury awarded Indu Craft $2 million on its breach of contract claim, after adjusting for its failure to mitigate damages, and $1.25 million on its *prima facie* tort claim. Upon plaintiff's counsel's

request, the trial court asked the jury foreman if the jury meant Indu Craft to receive a total award of $3.25 million or if the *prima facie* tort award was meant to be subsumed by the larger contract award. The foreman responded that the intended award was $3.25 million, which, upon being polled, the jury confirmed. The magistrate then ruled on the motion for judgment as a matter of law that the awards were duplicative for the same injury and vacated the *prima facie* tort award.

A plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery. *See Wickham Contracting Co. v. Board of Educ.*, 715 F.2d 21, 28 (2d Cir. 1983). The question we must answer was whether this doctrine was violated by the jury's award for defendants' *prima facie* tort. A court's role is to reconcile and preserve whenever possible a seemingly inconsistent jury verdict. *See Machleder v. Diaz*, 801 F.2d 46, 57 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); *Minpeco, S.A. v. Hunt*, 718 F. Supp. 168, 181 (S.D.N.Y. 1989). This role derives from the Seventh Amendment's obligation on courts not to recast factual findings of a jury, *see Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962), and is based on the notion that "juries are not bound by what seems inescapable logic to judges." *Morissette v. United States*, 342 U.S. 246, 276 (1952).

The jury's award of a net total of $3.25 million was in accordance with the expert's testimony. While it is possible that the jury impermissibly compensated Indu Craft twice for the same injury, it is equally rational to believe that the jury found that Indu Craft suffered $3.25 million worth of injuries and merely allocated that amount between the two different causes of action, one for breach of contract and one for tort. *See Gentile v. County*

of Suffolk, 926 F.2d 142, 153-54 (2d Cir. 1991) (where jury awarded $75,000 for state malicious prosecution claim and $75,000 for federal § 1983 claim, conceivable that jury found $150,000 of unduplicated injuries and merely split the amount equally).

That the jury meant the total award to be $3.25 million is clearly supported by their responses when being polled after the verdict. A jury's award is not duplicative simply because it allocates damages under two distinct causes of action. *See id.* at 154. The Bank made no showing other than the allocation of the award. Thus, it failed to establish the jury awards were duplicative. Because of our duty to reconcile a jury's verdict whenever possible, we think this award easily reconcilable and see no impermissible double recovery in the jury contract and tort awards. As a consequence, the judgment must be reversed and the jury's *prima facie* tort award reinstated.

III The Counterclaim

We now consider the remaining issue, which is the denial of the Bank's motion for judgment as a matter of law on its $1.7 million contract claim after the jury returned a no cause for action against it. Under its line of credit Indu Craft owed the Bank approximately $1.7 million for which the Bank asserted a counterclaim. Plaintiff admits this amount was outstanding, but maintains the Bank's actions in driving it out of business prevented it from performing under the note and thereby excuse performance. This "prevention doctrine" is often viewed as a corollary to the implied covenant of good faith. *See Sharma v. Skaarup Ship Management Corp.*, 699 F. Supp. 440, 449 (S.D.N.Y. 1988), *aff'd*, 916 F.2d 820 (2d

Cir. 1990), *cert. denied*, 499 U.S. 907 (1991). The jury agreed that the Bank prevented plaintiff's performance and returned a verdict on the counterclaim in favor of Indu Craft. The district court denied the Bank's motion for judgment as a matter of law.

While the parties have exerted much energy disputing the applicability of the prevention defense to the note, we are persuaded by a more compelling rationale urged by the Bank that judgment should have been granted. It is the purpose of damages under a breach of contract action to place the aggrieved party in the same economic position that it would have occupied absent the breach. *See Linblad Travel*, 730 F.2d at 92. Awarding Indu Craft the value of its business and at the same time relieving it from its obligation under the note actually places Indu Craft in a better economic position than it would otherwise have occupied, a result the law disfavors. To avoid such a windfall and place Indu Craft in the position it would have been in but for the Bank's breach of contract, the debt under the note must be set off from the damages owed Indu Craft.

CONCLUSION

Accordingly, we reverse the magistrate judge's disposition of the motion for judgment as a matter of law and remand to that court for it to reinstate the jury verdicts on Indu Craft's breach of contract and *prima facie* tort causes of action totalling $3.25 million, and for it to offset this total by the amount due the Bank under the note amounting to approximately $1.7 million, by granting the Bank's motion for judgment under its contract claim.

Reversed and remanded.

Appendix B - Endorsed Order of the United States Court of Appeals, Filed October 4, 1995 [Pages 18a - 19a]

NOTICE OF MOTION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

INDU CRAFT, INC.,

Plaintiff-Appellant-Cross-Appellee,

v.

BANK OF BARODA,

Defendant-Appellee-Cross-Appellant

----------X

94-7089, 94-7127
Docket Number

NOTICE OF MOTION

state type of motion

for Recall of Mandate

Motion By: (Name, address and tel. No. of law firm and of attorney in charge of case)	**Opposing Counsel:** (Name, address and tel. No. of law firm and of attorney in charge of case)
Eaton & Van Winkle LLP 600 Third Avenue New York, New York 10016 (212) 867-0606 Peter J. Schmerge (PS 4216)	Nixon, Hargrave, Devans & Doyle, 437 Madison Avenue New York, New York 10022 (212) 940-3000 Constance M. Boland

Judge or agency whose order is being appealed: Hon. Leonard A. Bernikow

Brief statement of the relief requested: Recall of Mandate issued March 31, 1995 to add direction for interest.

IT IS HEREBY ORDERED that the motion be and it hereby is granted and the magistrate

judge is directed to award post-judgment interest at the applicable federal rate from August 21, 1992, the date of the original judgment in the trial court.

Filed: October 4, 1995

Amalya L. Kearse

Richard J. Cardamone

Appendix C - Opinion of the United States Court of Appeals, Decided June 13, 1996 [Pages 20a - 33a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1176, 1348—August Term 1995

(Argued March 13, 1996 Decided June 13, 1996)

Docket Nos. 95-7865, 95-7965

INDU CRAFT, INC.,

Plaintiff-Counterclaim-Defendant-Appellee-Cross-Appellant,

—v.—

BANK OF BARODA,

Defendant-Counterclaim-Plaintiff-Appellant-Cross-Appellee,

—and—

KRISHNAKANT C. CHOKSHI,

Defendant-Appellant-Cross-Appellee.

Before:

CARDAMONE, WALKER, and MCLAUGHLIN,

Circuit Judges.

Defendants Bank of Baroda, a bank wholly-owned by the government of India, and its now retired officer, Krishnakant C. Chokshi, appeal from an order of the United States District Court for the Southern District of New York (Bernikow, *M.J.*), denying Baroda interest and attorneys' fees. Plaintiff Indu Craft cross-appeals from the district court's award to Indu Craft of post-judgment interest from August 12, 1992 at the federal rate of 3.41%.

Affirmed.

CONSTANCE M. BOLAND, Nixon, Hargrave, Devans & Doyle LLP, New York, New York (Kermitt J. Brooks, New York, New York, of counsel), *for Defendant-Counterclaim-Plaintiff-Appellant-Cross-Appellee.*

JONATHAN A. CHASE, ESQ., Briarcliff Manor, New York, *for Plaintiff-Counterclaim-Defendant-Appellee-Cross-Appellant.*

WALKER, *Circuit Judge*:

Defendants Bank of Baroda ("Baroda"), a bank wholly-owned by the government of India, and its now retired officer, Krishnakant C. Chokshi, appeal from an order of the United States District Court for the Southern District of New York (Leonard Bernikow, *Magistrate Judge*), denying Baroda interest and attorneys' fees. Plaintiff Indu Craft cross-appeals from the district

court's award to Indu Craft of post-judgment interest from August 12, 1992 at the federal rate of 3.41%. We affirm.

BACKGROUND

Nearly nine years ago, Indu Craft commenced this action to recover damages arising from Baroda's breach of its covenant of good faith and fair dealing implied in a loan agreement between the parties. The facts of this case are recited fully in our opinion on direct appeal, *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490 (2d Cir. 1995), and in the district court's opinion from which the parties now appeal, *Indu Craft, Inc. v. Bank of Baroda*, 87 Civ. 7379, 1995 WL 479516 (S.D.N.Y. Aug. 10, 1995). We briefly summarize those facts relevant to our disposition of the present issues on appeal.

Indu Craft, a New York corporation, was an importer and wholesale seller of sportswear throughout the United States. Indu Craft's relationship with Baroda began in 1983 when Indu Craft obtained a line of credit from Baroda. The line of credit was increased periodically. On December 15, 1986, Baroda made available to Indu Craft up to $2.7 million pursuant to a letter agreement. As security for the line of credit, Indu Craft executed a promissory note in favor of Baroda in the amount of $2.7 million that included provisions for interest on the outstanding amount as well as attorneys' fees in the event the bank retained counsel to enforce or collect on the note.

In March 1987, when Indu Craft refused to make an investment for the benefit of Chokshi's son, Baroda reduced the maximum amount of credit it was willing to

extend to Indu Craft from $2.7 million to $2.3 million and effectively drove Indu Craft out of business. On October 15, 1987, Indu Craft commenced this action in which it alleged that Baroda and Chokshi reduced the line of credit in bad faith. Baroda counterclaimed for the amount due on the promissory note, approximately $1.7 million.

On August 12, 1992, following a four and one-half week jury trial before Magistrate Judge Bernikow, the plaintiff won a jury verdict of $3.25 million, consisting of $2 million on a breach of contract claim and $1.25 million on a tort claim. Because the jury found that Baroda's actions were taken in bad faith and wrongfully prevented Indu Craft from repaying the note, the jury did not award Baroda any recovery on its counterclaim. Judgment was entered accordingly on August 21, 1992. On December 17, 1993, however, Magistrate Judge Bernikow granted the defendants' post-trial motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50 and dismissed the complaint. In addition, the district court denied Baroda's motion for judgment as a matter of law on the promissory note counterclaim.

On February 3, 1995, we reversed the district court, directed that Indu Craft's verdict be reinstated, and ordered that the amount due on the promissory note be offset from the amount of the jury verdict. *Indu Craft*, 47 F.3d 490. On remand, the district court reduced the jury verdict by the principal amount due on the promissory note and denied Baroda's application for interest and attorneys' fees. *Indu Craft*, 1995 WL 479516. The district court awarded prejudgment interest to Indu Craft on the net balance of the jury award remaining after deduction of Baroda's setoff. Judgment in the amount of $2,268,865.43 was entered on August 17, 1995. There-

after, Indu Craft moved this court to recall the mandate, and on October 4, 1995, we directed the district court "to award post-judgment interest at the applicable federal rate from August 21, 1992, the date of the original judgment in the trial court." On October 19, 1995, an amended judgment in the amount of $2,519,822.29 was entered to include post-judgment interest from August 12, 1992 at the federal rate of 3.41%.[1] Both sides now appeal.

DISCUSSION

The award of interest is generally within the discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. *Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 613 (2d Cir.), *cert. denied*, 115 S. Ct. 198 (1994). With regard to prejudgment interest determinations, however, "New York law does not permit the trial court to exercise any discretion" where a party is entitled to such interest as a matter of right. *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 878 (2d Cir. 1976) (citations omitted).

I. *Bank of Baroda's Appeal*

The primary issue on appeal is whether interest should have been added to the amount due to Baroda under the promissory note on its counterclaim before offsetting that amount against the award in favor of Indu Craft. Upon reinstating the $3.25 million jury verdict, the district court offset only the principal amount due on the

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[1] This figure is arrived at by adding the individual components of Indu Craft's recovery spelled out in the amended judgment. Although the judgment states a subtotal on Indu Craft's $1.25 million tort claim of $2,019,720.83, including interest, this number reflects a mathematical error in the amount of $10,000.

promissory note. In doing so, the district court relied on the "interest on the balance" rule, which states that prejudgment interest should be awarded on the net balance of the jury verdict remaining after deduction of Baroda's setoff. *See Indu Craft*, 1995 WL 479516, at *1; *see also Manshul Constr. Corp. v. Dormitory Auth.*, 436 N.Y.S.2d 724, 727 (1st Dep't 1981).

The parties hotly contest the proper characterization of the award on appeal by this court to Baroda, which was realized as a setoff against Indu Craft's jury verdict. Baroda contends that because it prevailed on appeal for the amount due on the promissory note, it is entitled to interest as a matter of right under New York law. In opposition, Indu Craft claims that because the setoff was an equitable adjustment to Indu Craft's jury award, rather than a recovery on its breach of contract counterclaim, Baroda is not a "prevailing party" and thus was properly denied prejudgment interest.

Baroda's contention that it is entitled to an award of prejudgment interest as a party that has prevailed on a breach of contract claim is based on New York C.P.L.R. § 5001(a), which states:

> Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

Section 5001(a) entitles a "prevailing party" to prejudgment interest as a matter of right. *State v. Williams*, 528 N.Y.S.2d 353, 353 (3d Dep't 1988); *Delulio v. 320-*

57 Corp., 472 N.Y.S.2d 379, 381 (1st Dep't 1984). An award of prejudgment interest on an equitable claim is discretionary. *Scheller v. Bowery Sav. Bank*, 630 N.Y.S.2d 62, 64 (1st Dep't 1995); *Margo Properties, Inc. v. Nelson*, 473 N.Y.S.2d 822, 823 (1st Dep't 1984).

Unable to explain why its $1.7 million award should be considered a recovery on its contract claim in light of the jury's verdict, rather than an equitable adjustment, Baroda is reduced to quoting our earlier holding that directed the magistrate judge to "grant[ ] the Bank's motion for judgment under its contract claim." *Indu Craft*, 47 F.3d at 498. Baroda mischaracterizes this court's holding, however, for in discussing the damage award, we stated:

> We now consider the remaining issue, which is the denial of the Bank's motion for judgment as a matter of law on its $1.7 million contract claim after the jury returned a no cause for action against it. Under its line of credit Indu Craft owed the Bank approximately $1.7 million for which the Bank asserted a counterclaim. Plaintiff admits this amount was outstanding, but maintains the Bank's actions in driving it out of business prevented it from performing under the note and thereby excuse performance.
>
> . . . .
>
> While the parties have exerted much energy disputing the applicability of the prevention defense to the note, we are persuaded by a more compelling rationale urged by the Bank that judgment should have been granted. It is the purpose of damages under a breach of contract action to place the aggrieved party in the same economic position than

> it would have occupied absent the breach. Awarding Indu Craft the value of its business and at the same time relieving it from its obligation under the note actually place[d] Indu Craft in a better economic position than it would otherwise have occupied, a result the law disfavors. To avoid such a windfall and place Indu Craft in the position it would have been in but for the Bank's breach of contract, the debt under the note must be set off from the damages owed Indu Craft.

Id. at 497-98 (internal quotation and citations omitted).

It is plain that we did not disturb the jury's finding that Baroda's bad faith in reducing the credit line caused Indu Craft's inability to honor the promissory note. Rather, we allowed the setoff simply to avoid a windfall to Indu Craft. To that end, Baroda's reliance on *Studiengesellschaft Kohle MBH v. Novamont Corp.*, 548 F. Supp. 234 (S.D.N.Y. 1981), is unavailing, for in *Novamont* the district court found that the counterclaimant had a meritorious breach of contract claim. *Id.* at 235.

In sum, our direction to reduce Indu Craft's award by the amount of Baroda's counterclaim was based on equitable principles, and Baroda therefore does not have a right to prejudgment interest under New York C.P.L.R. § 5001(a). In addition, because Baroda is in no sense a prevailing party, the district court did not abuse its discretion in denying prejudgment interest.

Under a similar theory of recovery, Baroda also seeks an award of attorneys' fees under the loan agreement, which provides, "[i]f an attorney is used to enforce or collect this note, the undersigned shall be obligated to pay all costs and expenses of collection, including reasonable attorneys' fees." Baroda again relies on its

assertion that it is a prevailing party, an argument that we have already rejected. As the party in breach, Baroda is not entitled to its attorneys' fees. *See Nestor v. McDowell*, 599 N.Y.S.2d 507, 510 (1993).

II. *Indu Craft's Cross-Appeal*

On cross-appeal, Indu Craft challenges several aspects of the district court's judgment. Indu Craft maintains that it is entitled to (1) interest on the full amount of Indu Craft's verdict before deduction of the amount of the equitable setoff, (2) additional post-verdict, pre-judgment interest at 9% from the date of the original judgment (August 12, 1992) through the date the judgment was reinstated (October 19, 1995) pursuant to New York C.P.L.R. §§ 5002 and 5004, (3) post-judgment interest from October 19, 1995 at the rate applicable when the judgment was reinstated (5.62%) rather than at the rate applicable at the time of the original judgment (3.41%) pursuant to 28 U.S.C. § 1961, and (4) compound prejudgment interest. Although Baroda disputes each of these claims, it concedes that Indu Craft is entitled to the following interest amounts: (1) prejudgment interest at 9% under New York C.P.L.R. § 5001(a) from July 9, 1987 to August 12, 1992 (jury verdict); (2) post-verdict, prejudgment interest at 9% under New York C.P.L.R. § 5002 from August 12, 1992 to August 21, 1992 (original judgment); and (3) post-judgment interest at 3.41% under 28 U.S.C. § 1961 from August 21, 1992 (original judgment) through the present. We consider each claim in turn.

A. *Interest to be calculated before the offset?*

Indu Craft argues for the first time on appeal that the district court erred by deducting the amount of the setoff

from Indu Craft's damages before computing Indu Craft's pre-verdict interest pursuant to New York C.P.L.R. § 5001. Indu Craft maintains that the application of the "interest on the balance" rule, in which the setoff was deducted from Indu Craft's award before the addition of pre-verdict interest, effectively granted Baroda pre-verdict interest on its $1.7 million equitable recovery at the statutory rate of 9%. According to Indu Craft, the application of the "interest on the balance" rule in this instance failed to take into account the equitable nature of Baroda's recovery, for this award was intended not to make Baroda "whole" but rather to avoid a windfall to Indu Craft.

Despite that Indu Craft's prior trial counsel filed no fewer than three briefs concerning the calculation of interest on the judgment between the filing of our February 3, 1995 mandate directing the $1.7 million offset and the district court's August 10, 1995 memorandum order, Indu Craft did not urge this argument before the district court. Ironically, Indu Craft implored the district court to award post-verdict, prejudgment interest on the net balance of the jury verdict remaining after the deduction of Baroda's setoff. Generally speaking, we "will not consider an issue raised for the first time on appeal." *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir. 1996) (quoting *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994)). Indu Craft offers no reason for its failure to raise this issue below and we do not believe that an injustice will result if we do not resolve it now in Indu Craft's favor. We therefore decline the invitation to address this issue and conclude that the district court did not abuse its discretion in deducting the amount of the setoff from Indu Craft's damages before computing pre-verdict interest.

Appendix C

B. *Post-verdict, prejudgment interest*

The award of post-judgment interest is mandatory under 28 U.S.C. § 1961. As the district court noted, the parties agree that Indu Craft is entitled to prejudgment interest for the period before this court's original judgment of August 21, 1992. Indu Craft now seeks an additional award of prejudgment interest for the period between the entry of the original judgment and the entry of the reinstated judgment. The determination of the date when post-judgment interest begins to accrue establishes, in turn, when prejudgment interest (which in this case is calculated at the substantially higher New York rate) ceases to accrue. In this case, more than three years elapsed between the original judgment, which was entered on August 21, 1992, and the reinstated judgment, which was entered on October 19, 1995.

In opposition to Indu Craft's request, Baroda principally argues that we previously denied this request on October 4, 1995, when we ruled on Indu Craft's motion to recall the mandate. Our original opinion contained no instructions to the district court concerning the award of post-judgment interest. Therefore, in the judgment of August 18, 1995, the district court only awarded Indu Craft prejudgment interest at 9% under New York law from July 9, 1987 to August 21, 1992, the date the original judgment was entered. On August 29, 1995, Indu Craft moved to recall the mandate "to add direction for interest." On October 4, 1995, we directed the district court—without opinion—to award Indu Craft "post-judgment interest at the applicable federal rate from August 21, 1992, the date of the original judgment."

Notwithstanding our earlier direction, Indu Craft urges us to consider the merits of its argument on the ground

that the precise issue was not fully considered by the earlier panel on the motion to recall the mandate. *See DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir.) (cannot presume that denial of motion to recall mandate constitutes comprehensive rejection on merits of arguments presented), *cert. denied*, 115 S. Ct. 512 (1994). Even if we were to reconsider our earlier mandate, Indu Craft would fare no better. Although we have previously interpreted 28 U.S.C. § 1961 to require that interest run only from the date of the mandate issued from this court, *see Powers v. New York Cent. R.R.*, 251 F.2d 813, 818 (2d Cir. 1958), that interpretation of 28 U.S.C. § 1961 has been superseded by Fed. R. App. P. 37, *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472-73 (2d Cir. 1988), which states:

> If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

This rule "gives appellate courts discretion to decide the issue on a case-by-case basis." *Smith*, 856 F.2d at 473.

We reaffirm our earlier holding that post-judgment interest should run from the date of the original judgment. In *Andrulonis v. United States*, 26 F.3d 1224 (2d Cir. 1994), we held that post-judgment interest is to commence from a judgment that is "ascertained in [a] meaningful way" and is "supported by the evidence." *Id.* at 1233 (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836 (1990)). In this case, our reversal of the district court's grant of Baroda's motion for judgment as a matter of law does not change the fact that the judgment was ascertained in a meaningful sense on

August 21, 1992, the date on which the original judgment was entered following the jury verdict.

Indu Craft's reliance on *Kaiser*, in which the Supreme Court held that post-judgment interest should accrue from the date of the reinstated judgment, is misplaced. 494 U.S. at 835. In *Kaiser*, the Supreme Court set the date for the commencement of post-judgment interest immediately after the later judgment rather than after the initial judgment, because the district court found that the first judgment was not supported by sufficient evidence on the issue of damages. *See id.* Unlike *Kaiser*, here we did not disturb the jury's factual findings on appeal and the original judgment was sufficiently substantiated by the evidence. We reaffirm our earlier directive that post-judgment interest runs from the date of the trial court's first judgment, August 21, 1992, on the principal sum provided in our mandate of February 3, 1995.

C. *Post-judgment interest rate*

On October 19, 1995, the district court amended its earlier judgment to add post-judgment interest from August 12, 1992 at the federal rate of 3.41%. Indu Craft argues that because post-verdict, prejudgment interest should be awarded through the date of the reinstated judgment, post-judgment interest should properly be calculated at 5.62%, the rate applicable when the judgment was reinstated on October 19, 1995. Because we have determined above that post-judgment interest should be awarded commencing on August 21, 1992, the date of the original judgment, post-judgment interest was properly awarded from the date of the original judgment at a rate of 3.41% and post-verdict, prejudgment interest was appropriately awarded at the state rate of 9%, *see* New

York C.P.L.R. §§ 5002 & 5004, for August 12, 1992 through August 21, 1992.

D. *Compound prejudgment interest*

Finally, Indu Craft claims that it should have been awarded compound interest from July 9, 1987 through October 19, 1995 on the basis of the jury's finding that Baroda acted in bad faith. *See Wilson v. Great Am. Indus.*, 763 F. Supp. 688, 691 (N.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 979 F.2d 924 (2d Cir. 1992). This issue was not raised below, and we decline to disturb the district court's failure to award compound prejudgment interest.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Appendix D - Amended Opinion of the United States Court of Appeals, Decided June 13, 1996, Filed July 9, 1996 [Pages 34a - 47a]

[AMENDED OPINION]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1176, 1348—August Term 1995

Argued: March 13, 1996 Decided: June 13, 1996

Amended Opinon Filed: July 9, 1996

Docket Nos. 95-7865, 95-7965

INDU CRAFT, INC.,

Plaintiff-Counterclaim-Defendant-Appellee-Cross-Appellant,

—v.—

BANK OF BARODA,

Defendant-Counterclaim-Plaintiff-Appellant-Cross-Appellee,

—and—

KRISHNAKANT C. CHOKSHI,

Defendant-Appellant-Cross-Appellee.

Before:

CARDAMONE, WALKER, and MCLAUGHLIN,

Circuit Judges.

Defendants Bank of Baroda, a bank wholly-owned by the government of India, and its now retired officer, Krishnakant C. Chokshi, appeal from an order of the United States District Court for the Southern District of New York (Bernikow, *M.J.*), denying Baroda interest and attorneys' fees. Plaintiff Indu Craft cross-appeals from the district court's award to Indu Craft of post-judgment interest from August 21, 1992 at the federal rate of 3.41%.

Affirmed.

CONSTANCE M. BOLAND, Nixon, Hargrave, Devans & Doyle LLP, New York, New York (Kermitt J. Brooks, New York, New York, of counsel), *for Defendant-Counterclaim-Plaintiff-Appellant-Cross-Appellee.*

JONATHAN A. CHASE, Esq., Briarcliff Manor, New York, *for Plaintiff-Counterclaim-Defendant-Appellee-Cross-Appellant.*

WALKER, *Circuit Judge*:

Defendants Bank of Baroda ("Baroda"), a bank wholly-owned by the government of India, and its now retired officer, Krishnakant C. Chokshi, appeal from an order of the United States District Court for the Southern District of New York (Leonard Bernikow, *Magistrate Judge*), denying Baroda interest and attorneys' fees. Plaintiff Indu Craft cross-appeals from the district

court's award to Indu Craft of post-judgment interest from August 21, 1992 at the federal rate of 3.41%. We affirm.

BACKGROUND

Nearly nine years ago, Indu Craft commenced this action to recover damages arising from Baroda's breach of its covenant of good faith and fair dealing implied in a loan agreement between the parties. The facts of this case are recited fully in our opinion on direct appeal, *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490 (2d Cir. 1995), and in the district court's opinion from which the parties now appeal, *Indu Craft, Inc. v. Bank of Baroda*, 87 Civ. 7379, 1995 WL 479516 (S.D.N.Y. Aug. 10, 1995). We briefly summarize those facts relevant to our disposition of the present issues on appeal.

Indu Craft, a New York corporation, was an importer and wholesale seller of sportswear throughout the United States. Indu Craft's relationship with Baroda began in 1983 when Indu Craft obtained a line of credit from Baroda. The line of credit was increased periodically. On December 15, 1986, Baroda made available to Indu Craft up to $2.7 million pursuant to a letter agreement. As security for the line of credit, Indu Craft executed a promissory note in favor of Baroda in the amount of $2.7 million that included provisions for interest on the outstanding amount as well as attorneys' fees in the event the bank retained counsel to enforce or collect on the note.

In March 1987, when Indu Craft refused to make an investment for the benefit of Chokshi's son, Baroda reduced the maximum amount of credit it was willing to

extend to Indu Craft from $2.7 million to $2.3 million and effectively drove Indu Craft out of business. On October 15, 1987, Indu Craft commenced this action in which it alleged that Baroda and Chokshi reduced the line of credit in bad faith. Baroda counterclaimed for the amount due on the promissory note, approximately $1.7 million.

On August 12, 1992, following a four and one-half week jury trial before Magistrate Judge Bernikow, the plaintiff won a jury verdict of $3.25 million, consisting of $2 million on a breach of contract claim and $1.25 million on a tort claim. Because the jury found that Baroda's actions were taken in bad faith and wrongfully prevented Indu Craft from repaying the note, the jury did not award Baroda any recovery on its counterclaim. Judgment was entered accordingly on August 21, 1992. On December 17, 1993, however, Magistrate Judge Bernikow granted the defendants' post-trial motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50 and dismissed the complaint. In addition, the district court denied Baroda's motion for judgment as a matter of law on the promissory note counterclaim.

On February 3, 1995, we reversed the district court, directed that Indu Craft's verdict be reinstated, and ordered that the amount due on the promissory note be offset from the amount of the jury verdict. *Indu Craft*, 47 F.3d 490. On remand, the district court reduced the jury verdict by the principal amount due on the promissory note and denied Baroda's application for interest and attorneys' fees. *Indu Craft*, 1995 WL 479516. The district court awarded prejudgment interest to Indu Craft on the net balance of the jury award remaining after deduction of Baroda's setoff. Judgment in the amount of $2,268,865.43 was entered on August 17, 1995. There-

after, Indu Craft moved this court to recall the mandate, and on October 4, 1995, we directed the district court "to award post-judgment interest at the applicable federal rate from August 21, 1992, the date of the original judgment in the trial court." On October 19, 1995, an amended judgment in the amount of $2,519,822.29 was entered to include post-judgment interest from August 21, 1992 at the federal rate of 3.41%.[1] Both sides now appeal.

DISCUSSION

The award of interest is generally within the discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. *Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 613 (2d Cir.), *cert. denied*, 115 S. Ct. 198 (1994). With regard to prejudgment interest determinations, however, "New York law does not permit the trial court to exercise any discretion" where a party is entitled to such interest as a matter of right. *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 878 (2d Cir. 1976) (citations omitted).

I. *Bank of Baroda's Appeal*

The primary issue on appeal is whether interest should have been added to the amount due to Baroda under the promissory note on its counterclaim before offsetting that amount against the award in favor of Indu Craft. Upon reinstating the $3.25 million jury verdict, the district court offset only the principal amount due on the

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[1] This figure is arrived at by adding the individual components of Indu Craft's recovery spelled out in the amended judgment. Although the judgment states a subtotal on Indu Craft's $1.25 million tort claim of $2,019,720.83, including interest, this number reflects a mathematical error in the amount of $10,000.

promissory note. In doing so, the district court relied on the "interest on the balance" rule, which states that prejudgment interest should be awarded on the net balance of the jury verdict remaining after deduction of Baroda's setoff. *See Indu Craft*, 1995 WL 479516, at *1; *see also Manshul Constr. Corp. v. Dormitory Auth.*, 436 N.Y.S.2d 724, 727 (1st Dep't 1981).

The parties hotly contest the proper characterization of the award on appeal by this court to Baroda, which was realized as a setoff against Indu Craft's jury verdict. Baroda contends that because it prevailed on appeal for the amount due on the promissory note, it is entitled to interest as a matter of right under New York law. In opposition, Indu Craft claims that because the setoff was an equitable adjustment to Indu Craft's jury award, rather than a recovery on its breach of contract counterclaim, Baroda is not a "prevailing party" and thus was properly denied prejudgment interest.

Baroda's contention that it is entitled to an award of prejudgment interest as a party that has prevailed on a breach of contract claim is based on New York C.P.L.R. § 5001(a), which states:

> Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

Section 5001(a) entitles a "prevailing party" to prejudgment interest as a matter of right. *State v. Williams*, 528 N.Y.S.2d 353, 353 (3d Dep't 1988); *Delulio v.*

320-57 Corp., 472 N.Y.S.2d 379, 381 (1st Dep't 1984). An award of prejudgment interest on an equitable claim is discretionary. *Scheller v. Bowery Sav. Bank*, 630 N.Y.S.2d 62, 64 (1st Dep't 1995); *Margo Properties, Inc. v. Nelson*, 473 N.Y.S.2d 822, 823 (1st Dep't 1984).

Unable to explain why its $1.7 million award should be considered a recovery on its contract claim in light of the jury's verdict, rather than an equitable adjustment, Baroda is reduced to quoting our earlier holding that directed the magistrate judge to "grant[ ] the Bank's motion for judgment under its contract claim." *Indu Craft*, 47 F.3d at 498. Baroda mischaracterizes this court's holding, however, for in discussing the damage award, we stated:

> We now consider the remaining issue, which is the denial of the Bank's motion for judgment as a matter of law on its $1.7 million contract claim after the jury returned a no cause for action against it. Under its line of credit Indu Craft owed the Bank approximately $1.7 million for which the Bank asserted a counterclaim. Plaintiff admits this amount was outstanding, but maintains the Bank's actions in driving it out of business prevented it from performing under the note and thereby excuse performance.
>
> . . . .
>
> While the parties have exerted much energy disputing the applicability of the prevention defense to the note, we are persuaded by a more compelling rationale urged by the Bank that judgment should have been granted. It is the purpose of damages under a breach of contract action to place the aggrieved party in the same economic position than

> it would have occupied absent the breach. Awarding Indu Craft the value of its business and at the same time relieving it from its obligation under the note actually place[d] Indu Craft in a better economic position than it would otherwise have occupied, a result the law disfavors. To avoid such a windfall and place Indu Craft in the position it would have been in but for the Bank's breach of contract, the debt under the note must be set off from the damages owed Indu Craft.

Id. at 497-98 (internal quotation and citations omitted).

It is plain that we did not disturb the jury's finding that Baroda's bad faith in reducing the credit line caused Indu Craft's inability to honor the promissory note. Rather, we allowed the setoff simply to avoid a windfall to Indu Craft. To that end, Baroda's reliance on *Studiengesellschaft Kohle MBH v. Novamont Corp.*, 548 F. Supp. 234 (S.D.N.Y. 1981), is unavailing, for in *Novamont* the district court found that the counterclaimant had a meritorious breach of contract claim. *Id.* at 235.

In sum, our direction to reduce Indu Craft's award by the amount of Baroda's counterclaim was based on equitable principles, and Baroda therefore does not have a right to prejudgment interest under New York C.P.L.R. § 5001(a). In addition, because Baroda is in no sense a prevailing party, the district court did not abuse its discretion in denying prejudgment interest.

Under a similar theory of recovery, Baroda also seeks an award of attorneys' fees under the loan agreement, which provides, "[i]f an attorney is used to enforce or collect this note, the undersigned shall be obligated to pay all costs and expenses of collection, including reasonable attorneys' fees." Baroda again relies on its

assertion that it is a prevailing party, an argument that we have already rejected. As the party in breach, Baroda is not entitled to its attorneys' fees. *See Nestor v. McDowell*, 599 N.Y.S.2d 507, 510 (1993).

II. *Indu Craft's Cross-Appeal*

On cross-appeal, Indu Craft challenges several aspects of the district court's judgment. Indu Craft maintains that it is entitled to (1) interest on the full amount of Indu Craft's verdict before deduction of the amount of the equitable setoff, (2) additional post-verdict, pre-judgment interest at 9% from the date of the original judgment (August 21, 1992) through the date the judgment was reinstated (October 19, 1995) pursuant to New York C.P.L.R. §§ 5002 and 5004, (3) post-judgment interest from October 19, 1995 at the rate applicable when the judgment was reinstated (5.62%) rather than at the rate applicable at the time of the original judgment (3.41%) pursuant to 28 U.S.C. § 1961, and (4) compound prejudgment interest. Although Baroda disputes each of these claims, it concedes that Indu Craft is entitled to the following interest amounts: (1) prejudgment interest at 9% under New York C.P.L.R. § 5001(a) from July 9, 1987 to August 12, 1992 (jury verdict); (2) post-verdict, prejudgment interest at 9% under New York C.P.L.R. § 5002 from August 12, 1992 to August 21, 1992 (original judgment); and (3) post-judgment interest at 3.41% under 28 U.S.C. § 1961 from August 21, 1992 (original judgment) through the present. We consider each claim in turn.

A. *Interest to be calculated before the offset?*

Indu Craft argues that the district court erred by deducting the amount of the setoff from Indu Craft's

damages before computing Indu Craft's pre-verdict interest pursuant to New York C.P.L.R. § 5001. Indu Craft maintains that the application of the "interest on the balance" rule, in which the setoff was deducted from Indu Craft's award before the addition of pre-verdict interest, effectively granted Baroda pre-verdict interest on its $1.7 million equitable recovery at the statutory rate of 9%. According to Indu Craft, the application of the "interest on the balance" rule in this instance failed to take into account the equitable nature of Baroda's recovery, for this award was intended not to make Baroda "whole" but rather to avoid a windfall to Indu Craft.

As the district court noted, although New York cases have not used the phrase "interest on the balance rule," they generally have followed it. *See, e.g., Manshul*, 436 N.Y.S.2d at 727; *Sloan v. Pinafore Homes, Inc.*, 329 N.Y.S.2d 420, 421 (2d Dep't 1972). Accordingly, the district court deducted Baroda's setoff and calculated interest on the balance. As in the usual case in which the rule is applied, in this case the plaintiff had use of the amount due under the note during the pendency of the litigation. Moreover, the setoff was directly related to the plaintiff's claim and was not collateral to it. *See Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc.*, 416 F.2d 207, 212 (8th Cir. 1969). For these reasons, we conclude that the district court's calculation of interest on the amount after setoff was not so inequitable and so unfair that we are compelled to disturb it.

B. *Post-verdict, prejudgment interest*

The award of post-judgment interest is mandatory under 28 U.S.C. § 1961. As the district court noted, the parties agree that Indu Craft is entitled to prejudgment interest for the period before this court's original judg-

ment of August 21, 1992. Indu Craft now seeks an additional award of prejudgment interest for the period between the entry of the original judgment and the entry of the reinstated judgment. The determination of the date when post-judgment interest begins to accrue establishes, in turn, when prejudgment interest (which in this case is calculated at the substantially higher New York rate) ceases to accrue. In this case, more than three years elapsed between the original judgment, which was entered on August 21, 1992, and the reinstated judgment, which was entered on October 19, 1995.

In opposition to Indu Craft's request, Baroda principally argues that we previously denied this request on October 4, 1995, when we ruled on Indu Craft's motion to recall the mandate. Our original opinion contained no instructions to the district court concerning the award of post-judgment interest. Therefore, in the judgment of August 18, 1995, the district court only awarded Indu Craft prejudgment interest at 9% under New York law from July 9, 1987 to August 21, 1992, the date the original judgment was entered. On August 29, 1995, Indu Craft moved to recall the mandate "to add direction for interest." On October 4, 1995, we directed the district court—without opinion—to award Indu Craft "post-judgment interest at the applicable federal rate from August 21, 1992, the date of the original judgment."

Notwithstanding our earlier direction, Indu Craft urges us to consider the merits of its argument on the ground that the precise issue was not fully considered by the earlier panel on the motion to recall the mandate. *See DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir.) (cannot presume that denial of motion to recall mandate constitutes comprehensive rejection on merits of arguments presented), *cert. denied*, 115 S. Ct. 512 (1994).

Even if we were to reconsider our earlier mandate, Indu Craft would fare no better. Although we have previously interpreted 28 U.S.C. § 1961 to require that interest run only from the date of the mandate issued from this court, *see Powers v. New York Cent. R.R.*, 251 F.2d 813, 818 (2d Cir. 1958), that interpretation of 28 U.S.C. § 1961 has been superseded by Fed. R. App. P. 37, *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472-73 (2d Cir. 1988), which states:

> If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

This rule "gives appellate courts discretion to decide the issue on a case-by-case basis." *Smith*, 856 F.2d at 473.

We reaffirm our earlier holding that post-judgment interest should run from the date of the original judgment. In *Andrulonis v. United States*, 26 F.3d 1224 (2d Cir. 1994), we held that post-judgment interest is to commence from a judgment that is "ascertained in [a] meaningful way" and is "supported by the evidence." *Id.* at 1233 (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836 (1990)). In this case, our reversal of the district court's grant of Baroda's motion for judgment as a matter of law does not change the fact that the judgment was ascertained in a meaningful sense on August 21, 1992, the date on which the original judgment was entered following the jury verdict.

Indu Craft's reliance on *Kaiser*, in which the Supreme Court held that post-judgment interest should accrue from the date of the reinstated judgment, is misplaced. 494 U.S. at 835. In *Kaiser*, the Supreme Court set the date for the commencement of post-judgment interest

immediately after the later judgment rather than after the initial judgment, because the district court found that the first judgment was not supported by sufficient evidence on the issue of damages. *See id.* Unlike *Kaiser*, here we did not disturb the jury's factual findings on appeal and the original judgment was sufficiently substantiated by the evidence. We reaffirm our earlier directive that post-judgment interest runs from the date of the trial court's first judgment, August 21, 1992, on the principal sum provided in our mandate of February 3, 1995.

C. *Post-judgment interest rate*

On October 19, 1995, the district court amended its earlier judgment to add post-judgment interest from August 21, 1992 at the federal rate of 3.41%. Indu Craft argues that because post-verdict, prejudgment interest should be awarded through the date of the reinstated judgment, post-judgment interest should properly be calculated at 5.62%, the rate applicable when the judgment was reinstated on October 19, 1995. Because we have determined above that post-judgment interest should be awarded commencing on August 21, 1992, the date of the original judgment, post-judgment interest was properly awarded from the date of the original judgment at a rate of 3.41% and post-verdict, prejudgment interest was appropriately awarded at the state rate of 9%, *see* New York C.P.L.R. §§ 5002 & 5004, for August 12, 1992 through August 21, 1992.

D. *Compound prejudgment interest*

Finally, Indu Craft claims that it should have been awarded compound interest from July 9, 1987 through October 19, 1995 on the basis of the jury's finding that Baroda acted in bad faith. *See Wilson v. Great Am.*

Indus., 763 F. Supp. 688, 691 (N.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 979 F.2d 924 (2d Cir. 1992). This issue was not raised below, and we decline to disturb the district court's failure to award compound prejudgment interest.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Appendix E - Opinion and Order of the United States District Court, Southern District of New York, Filed December 17, 1993 [Pages 48a - 77a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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INDU CRAFT, INC.,

Plaintiff,

OPINION AND ORDER
87 Civ 7379 (KTD) (LB)

-against-

BANK OF BARODA,

Defendant and
Counterclaim Plaintiff,

KRISHNAKANT C. CHOKSHI,

Defendant.

----------X

APPEARANCES:

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Krishnakant C. Chokshi

Bernikow, U.S. Magistrate Judge:

Defendants move, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, to set aside the jury verdict and direct the entry of judgment in favor of defendants or, in the alternative, to grant a new trial on all or part of the issues and/or remittitur.

Background

This diversity action was brought by a garment importer alleging that defendants in 1987 arbitrarily reduced its line of credit at defendant Bank of Baroda ("the Bank") and that the bank; refused to honor its letters of credit.[1] Plaintiff says that the Bank took these actions after the president of plaintiff refused to join the son of defendant Krishnakant C. Chokshi, an officer at the bank, in a business venture. These actions, plaintiff alleges, put it out of business and prevented it from repaying its deft to the Bank. Plaintiff asserted three claims: breach of contract against the Bank based on the implied covenant of good faith and fair dealing, tortious interference with contract against the Bank and prima facie tort against both defendants. The Bank asserted two counterclaims--the first for breach of a note and the second for fraudulent misrepresentation. In connection with the first

[1] This case was referred to me, with the consent of the parties, for all purposes. See 28 U.S.C. § 636(c)(1).

counterclaim, the parties agreed that the bank advanced $1,764,000 pursuant to the note and that plaintiff did not repay that sum.

After a trial lasting over four weeks, the jury returned a verdict for plaintiff. With respect to the claim for breach of contract, it found the bank liable for $3,000,000, but reduced that amount by $1,000,000 because plaintiff failed to mitigate its damages. The jury also found both defendants liable on the prima facie tort claim in the sum of $1,250,000. Unlike the breach of claim, though, the jury on this claim found that had mitigated its damages. The jury found for defendants, however, on the tortious interference claim. On the counterclaims, the jury held for plaintiff. On the breach of the note claim, the jury found that defendants had presented plaintiff from repaying the bank.

Defendants raise a number of claims. They argue the court should have entered judgment as a matter of law on the Bank's claim on the note, on the claim for breach of the implied covenant in the Bank's favor and in their favor on the prima facie tort claim. Defendants also challenge the charge to the jury and they assert that the damages found by the jury were excessive. In addition, defendants argue that the court's evidentiary rulings prejudiced them.

Defendants further argue that the verdicts are inconsistent, and that a new trial is thus required. They note that the jury found that plaintiff did not

mitigate its damages under the breach of contract claim, yet did mitigate under the prima facie tort claim. In addition, defendants say that plaintiff offered the same proof of damages for all three of its causes of action, but the jury awarded $3 million in damages for the breach of contract and $1.25 million for prima facie tort. Finally, defendants claim inconsistency because the jury found that the same actions of the Bank and Mr. Chokshi were "not deliberate," but, at the same time, were done "with malice."

Discussion

a. Inconsistency in the Verdicts

As noted, defendants challenge the verdicts as inconsistent. In responding to such an argument, the court should search for an interpretation that reconciles the verdicts. United States Football League v. National Football League, 644 F.Supp. 1040, 1046 (S.D.N.Y. 1986), aff'd, 842 F.2d 1335 (2d Cir. 1988). In addition, inconsistent verdicts on separate claims are permissible. Id. At 1045.

As a preliminary matter, plaintiff contends that defendants waived the inconsistency in the verdicts. It points out that defendants requested no clarification before the discharge of the jury. United States Football League v. National Football League, 842 F.2d at 1367. It appears that counsel for defendants

raised no issue regarding the finding of malice without a finding of deliberateness.

But even if counsel had, any inconsistency, if there was one, occurred on two separate claims. The finding of a lack of deliberateness was made in connection with the tortious interference claim, while the finding of malice concerned the prima facie tort claim. As plaintiff argues, the jury did not have to find interference with contract to find prima facie tort. The prima facie tort claim concerned the reducing and cancelling of the line of credit and the refusal to open or amend letters of credit. The tortious interference claim, which the jury rejected, concerned plaintiff's contracts with its supplier, Trendi Sportswear Inc. Indeed in regard to the tortious interference claim, the jury responded negatively to a special interrogatory that asked "Where the Bank's and Mr. Chokshi's actions deliberate? That is, did they intend to interfere with Indu Craft's contracts with Trendi?" Thus, defendants' inconsistent verdict claim is rejected.

Defendants also challenge the verdict because the jury awarded two different sums based on the same proof of damages. Plaintiff offered the same proof of damages for all three claims, yet the jury returned a verdict on the breach of contract claim of $2,000,000 and $1,250,000 on the prima facie tort claim.

This inconsistency need not be reconciled, though, because the prima facie tort claim must be dismissed. Where a plaintiff seeks recovery for "the same damages under different legal theories of wrongdoing, the plaintiff should receive compensation for an item of damages only once." Gentile v. County of Suffolk, 926 F.2d 142, 153 (2d Cir. 1991) (citing Wickham Contracting Co. v. Board of Education, 715 F.2d 21, 28 (2d Cir. 1983)). Allowing the award for prima facie tort to stand constitutes double recovery. Cf. Hughes v. Patrolmen's Benev. Ass'n, 850 F.2d 876, 882-83 (2d Cir.), cert. denied, 488 U.S. 967 (1988) (vacating award for prima facie tort where a traditional tort provided compensation for the challenged conduct). Under these circumstances, the court. on its own initiative or on motion of a party, should reduce the judgment by the amount of the duplication to prevent double recovery U.S. Industries Inc. v. Touche Ross & Co., 854 F.2d 1223, 1259-60 (10th Cir. 1988). Thus, the prima facie tort award should be vacated. See Hughes, 850 F.2d at 883. In view of this ruling, defendants' argument that plaintiff failed to prove prima facie tort, because it did not establish that defendants were motivated solely by disinterested malevolence, need not be considered. Id.

b. Breach of the implied covenant of good faith

Defendants argue that the court should have entered judgment on the contract claim in favor of the Bank of Baroda as a matter of law. A motion

under Fed. R. Civ. P. 50(a), like a motion for summary judgment, rests on the theory that no genuine issue of material fact need be "resolved by the trier of fact so that the movant is entitled to judgment as a matter of law." 5A Moore's Federal Practice § 50.03[4] at 50-49 (2d Edition 1993); see also Piesco v. Koch, No. 93-7149, slip op. at 429 (2d Cir. Dec. 10, 1993). Defendants point out that plaintiff had an uncommitted revolving credit facility that permitted the bank to continue to lend money at its sole discretion.[2] Plaintiff, on the other hand, contends that it had a reasonable expectation of continued credit up to the agreed-upon line of credit. Defendants respond that plaintiff's position compels the bank to loan money to plaintiff up to the line of credit, and thus deprives the bank of its discretion. But defendants fail to recognize that the factual issue is whether the bank acted in good faith. And plaintiff has presented evidence of bad faith.

Plaintiff does not contend that the bank had no discretion. The bank's discretion, it argues, was limited by its obligation of good faith. See Components Direct Inc. v. European American Bank & Trust Co., 175 A.D.2d 227, 572 N.Y.S.2d 359, 361 (2d Dep't 1991) [3] "[E]very contact contains an

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[2] The loan agreement provided that "the Bank may loan such amounts as [the Bank] may, in its discretion, elect to make available to [plaintiff] .

[3] For the most part, the parties have cited New York case law. Thus, the law of New York governs this case. Cf. Alfin. Inc. v. Pacific Ins. Co., 735 F.Supp. 115, 118 (S.D.N.Y. 1990).

implied covenant of good faith and fair letting which precludes each party from engaging in conduct that will Deprive the other of the benefits of the their agreement." Resnick v. Resnick, 85 Civ. 9026 (RJW), 1930 WL 164968 *10 (S.D.N.Y. October 24, 1990) (citing Filner v. Shapiro, 633 F.2d 139, 143 (2d Cir. 1980)); see also Components Direct Inc. v. European American Bank & Trust Co., 572 N.Y.S.2d at 361. Still, no covenant can be implied that would be inconsistent with the other terms of the contractual relationship. National Westminster Bank v. Ross, 130 B.R. 656, 679 (S.D.N.Y. 1991), aff'd mem., sub nom. Yaeger v. National Westminster Bank, 962 F.2d 1 (2d Cir. 1992).

In Components Direct, as here, the loan agreement provided that funds were to be advanced to the corporate plaintiff in the sole discretion of the bank, but the court imposed an implied covenant of good faith and fair dealing. 572 N.Y.S.2d at 361. Similarly, in Carvel Cord. v. Diversified Management Group, Inc., 930 F.2d 228, 231 (2d Cir. 1991), the Court recognized the discretion afforded a party under an agreement, yet noted that such discretion was limited by its duty to act in good faith.

Defendants distinguish Components Direct because the bank there terminated the lice of credit and called the loan due, unlike the bank in the case it bar. Granted, the Bank of Baroda did not terminate the line of credit, but its actions had the same effect and the jury so found. Thus, judgment

as a matter of law in the bank's favor on the breach of the implied covenant cannot be entered.

M/a-Com Sec. Corp. v. Galesi, 904 F.2d 134, 136 (2d Cir. 1990), relied on by defendants, does not compel a different result. There the defendant argued that the plaintiff's opposition to a proposed merger, which ultimately resulted in the failure of defendant's investment, violated the implied covenant of good faith. It is true that Galesi found that the covenant did not in its action on a prevent summary judgment for the plaintiff promissory note. But the district court found that the implied covenant was not so broad as to prevent the plaintiff from advancing its own legitimate business interest in an unrelated transaction. Id. In affirming the district court, the Second Circuit explained that the implied covenant is enforced There an implied promise is so interwoven in the whole writing of a contract as to be necessary for effectuation of the purposes of the contract. Id. The covenant does not apply, the court added, to impair a party's right to act in its own interests even if exercise of those rights incidentally lessens the other party's anticipated benefits. Id. Also, the court found that the plaintiff's opposition to the merger was not the primary cause of the defendant's failure. Id. at 137. In the present case, the alleged bad faith of defendants directly related to the obligation at issue, not to an unrelated transaction.

Keene Corporation v. Bogan, No. 88 Civ. 0217 (MBM), 1990 WL 1864 (S.D.N.Y. Jan. 11,

1990), also cited by defendants, does not help them.[4] As defendant points out, the Bogan court found that the express terms of an agreement can override the implied covenant of good faith. That court also said, however, that whether a party acted in such reckless or neglectful disregard of a plaintiff's contract rights as to justify an inference of bad faith is a question of fact. Id. at *15. In Bogan, the court could say on the submissions that the defendants failed to present

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[4] Bogan, an action on a promissory note, involved the purchase of a company partly owned by defendant called SRS Industries. On the date of the sale, the defendant signed a promissory note to his company and the note was then assigned to the plaintiff. Id. at *1. The note was to be paid out of the "earn-out" payments due to the defendant under an asset purchase agreement calculated at a certain percentage of sales. Id. SRS became a division of the plaintiff and the defendant became SRS's president. SRS's earnings did not trigger the defendant's earn-out payments and he was eventually fired. The plaintiff sued on the note and the defendant moved for summary judgment, arguing that the plaintiff had violated the good faith covenant when it willfully destroyed the value of his earn-out payments by reducing his authority and otherwise ruining the company. Id. at *14. In granting summary judgment to the plaintiff, the court found that the defendant had not shown that plaintiff acted in bad faith: "None of the evidence that [the defendant] presents about [the plaintiff's] alleged mismanagement raised the implication that [the plaintiff] intended to lose money, or **even acted in reckless** disregard of obtaining profits." Id. at *15.

evidence of reckless or neglectful disregard. Here, the jury decided the factual question of bad faith against the Bank.

Resnick v. Resnick, No. 85 Civ. 9026 (RJW), 199O WL 164968 (S.D.N.Y. Oct. 24, 1990), is also unavailing. In that case, a claim was made that a bank had breached its duty of good faith and fair dealing by terminating a company's line of credit. Id. at *10. The company and the bark had a contractual relationship for over twenty years when the bank refused to continue this long term financing relationship. Id. at *11. The court granted the bank's motion for summary judgment because the company failed to show that the bank acted in bad faith. Id. In addition, no credit agreement existed committing the bank to advance the company a particular amount of money. Granted, as defendants argue, the case says that for approximately twenty years the company maintained a credit line with the bank for the purpose of opening letters of credit for its suppliers and borrowing funds for its operations. Id. at *1. Hence, the relationship between the borrower and lender is similar to the one in the present case. Nevertheless, Resnick differs from our case in that the company failed to present any factual basis for supposing that the bank acted in bad faith in denying further credit. Id. at *11. In addition, no credit agreement committed the bank in that case to advance the company a particular amount of money, a factor that has been held to provide a basis for requiring notice to the borrower when the lender

decides to terminate the relationship, as in K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 759 (6th Cir. 1985). Id.; see Fasolino Foods Co. v. Banca Nazionale Del Lavoro, 961 F.2d 1052, 1058 (2d Cir. 1992).

c. Weight of the evidence

Defendants also argue that the verdicts should be set aside as against the weight of the evidence. On the breach of contract claim, defendants say that there was ample evidence produced by all parties of justifiable business reasons for defendants' actions.

On a motion to set aside a verdict as against the weight of the evidence, the court must view the evidence in a light most favorable to the nonmovant. Sir Speedy Inc. v. L & P Graphics, Inc., 957 F.2d 1033, 1038 (2d Cir. 1992). The motion should be denied unless " 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached. '" Id. at 1038-39 (quoting Simbest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970)). With these principles in mind, defendant's argument must be rejected.

Plaintiff presented evidence that the bank treated it differently after its principal declined to join a business venture with Mr. Chokshi's son. For example, the bank's own witnesses testified that in previous dealings with plaintiff, it had not insisted

on audited financial statements or firm orders. They also indicated that the bank had allowed plaintiff substantial excess overdrafts and did not consider plaintiff in default for late payment of bill of bills. On another matter, the jury heard that Mr. Chokshi told plaintiff's principal that the Central Office had ordered the reduction of plaintiff's credit line, in fact the New York branch first informed the Central Office of the March 30 reduction on June 3, 1987. In short, plaintiff presented sufficient evidence that defendants' actions were motivated by other than justifiable business reasons.

d. Substantial Performance

Defendants also argue that the doctrine of substantial performance does not apply to this case and, hence, the court should not have submitted that issue to the jury. The doctrine applies to " 'the transgressor whose default is unintentional and trivial[,]' and not to '[t]he willful transgressors[.]' " Refinement Intern. Co. v. Eastbourne N.V., 815 F. Supp. 738, 743 (S.D.N.Y. 1993) (quoting Jacobs & Youngs v. Kent, 230 N.Y. 239, 244, 129 N.E. 889 (1921)). "Although, as a general rule, conditions precedent must be fully satisfied, 'courts have recognized that failure to perform a condition may be excused where there has been substantial performance ' " The Royal Bank of Canada v. Beneficial Finance Leasing Corp., No. 87 Civ. 1056(JMC), 1992 WL 167339 *9 (S.D.N.Y. June 30, 1992) (quoting Kennedy v. Automotive Maintenance

Inc., 87 Misc. 2d 190, 384 N.Y.S.2d 921, 922 (Diet. Ct., Suffolk Co. 1976)). The issue of substantial performance is usually one of fact, but if the inferences are certain, the question involves only a matter of law and should decided by the court. Anderson Clayton & Co. v. Alanthus Cord., 91 A.D.2d 985, 457 N.Y.S.2d 578, 579 (2d Dep't 1983) (citations and internal quotations omitted).

I permitted the question of substantial performance to go to the jury, as plaintiff urged, based in part on Tunnell Publishing Co. v. Straps Communications Inc., 169 A.D.2d 1031, 565 N.Y.S.2d 572, 574-75 (3d Dep't 1991), where the court did not enforce an acceleration clause in a promissory note. The court reasoned that "Where the breach asserted as the basis for the acceleration is trivial or inconsequential, the forfeiture may be viewed as an unconscionable penalty and equitable principles come into play." 565 N.Y.S.2d at 574.

Defendants argue that the terms of the Letter Agreement plaintiff failed to perform were material. They cite the failure of plaintiff to deliver an insurance policy, to pay its bills on time, to submit audited financial statements and to have sufficient collateral to satisfy a 120% margin requirement.

Plaintiff responds that disputed factual issues exist concerning its performance. In addition, plaintiff notes that the Bank never enforced certain of the allegedly material requirements of the agreements.

For example, in connection with defendants' complaint that no audited financial statement was submitted by plaintiff on or after May 29, 1987, the Bank never insisted upon such statements in their prior four year course of dealing. Moreover, defendants' banking expert conceded that on March 30, 1987, when plaintiff's line of credit was reduced, plaintiff's obligation to supply an audited financial statement had not yet attached. Trial Transcript ("Tr.") 2945. That obligation arose only on May 31 1987, 90 days after the end of its fiscal year. Tr. 2940.

Another instance of non-compliance cited by defendants concerns plaintiff's failure to provide the Bank with an insurance policy on the life of plaintiff's principal in the amount of $1..5 million with the Bank as beneficiary. Defendants claim that this requirement had to be satisfied by January 27, 1987. Plaintiff counters that a letter from an insurance agent states that a $1.5 million life insurance policy existed on its principal in favor of the Bank as loss payee. See Joint Exhibit 154. Plaintiff also points to a check providing payment of the premium for that coverage. See Plaintiff's Exhibit 69. Finally, plaintiff identifies factual disputes concerning the timely payment of bills and the margin requirement.

Defendants' position is not without force. The terms of the letter agreements are clear and explicit. Nevertheless, there are factual issues relating to the performance by plaintiff. Additionally, the Bank failed to insist upon strict compliance with a condition of the

contract it now asserts was violated. Thus, the issue of substantial performance raises questions appropriately left for the jury.

e. The bank's counterclaim. on. the note

Defendants next argue that judgment on the note should be granted in the Bank's favor as a matter of law. Defendants argue that plaintiff received a double recovery when the jury awarded it damages and at the same time found that it did not have to repay its $1.7 million debt. The jury found that defendants had prevented plaintiff from repaying the loan. It is undisputed, defendants say, that plaintiff owes the bank $1.7 million. Therefore, defendant seeks to have the court set-off the $1.7 million owed to the Bank against the damages recovered by Indu Craft.

Under the prevention doctrine, when a party to a contract wrongfully prevents another from performing, that performance is excused. District-Realty Title Ins. Corm. v. Ensmann, 767 F.2d 1018, 1023 (D.C. Cir. 1985). Nevertheless, when the express terms of the agreement permit a party to prevent a condition from happening, there is no prevention. Id. Defendants point to the Letter Agreement, which provides that the bank may loan such amounts as it may, in its sole discretion, elect to make available to plaintiff up to $2,700,000.[5] Joint Ex.

[5] The bank also refers to the General Loan and Security Agreement, which provides that should plaintiff fail to pay its bills when due, "any obligations of the Bank to lend

52. Thus, defendants argue, in denying plaintiff additional credit, the bank did nothing more than exercise its unambiguous discretionary rights pursuant to the agreements. As indicated in connection with the breach of contract claim, the bank's discretion is still limited by its duty to act in good faith.[6] See Carvel, 930 F.2d at 231.

Defendants also argue that New York law does not apply the prevention defense to notes. That a prevention defense exists under New York law, however, seems clear. As stated in Young v. Whitney, 111 A.D.2d 1013. 490 N.Y.S.2d 330, 332 (3d Dep't 1985)(citations omitted), "the law implies in every contract that one party will not prevent the other party's performance." Whether the prevention defense applies to a note is less clear. Of course, a note is essentially a contract. And as plaintiff points out, under N.Y.U.C.C. §3-306(b), the holder of a promissory note takes the instrument subject to all defenses that would be available on a simple contract.

Moreover, defendant submits no authority in support of its position. Indeed, those decisions involving notes and the prevention defense do not suggest that the doctrine is not applicable to notes. In United States v. Wallace & Wallace Fuel Oil Co., 540 F.Supp. 419, 428

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funds or otherwise extend financial accommodations to [plaintiff] under this or any other agreement shall cease and terminate." Joint Ex. 55 at 3; ¶ V.f.

[6] The prevention doctrine and the implied covenant of good faith are related concepts. In re Gulf Oil/Cities Service Tender Offer Litigation, 725 F. Supp. 712, 737 n. 9 (S.D.N.Y. 1989).

(S.D.N.Y. 1982), an action to enforce a debt agreement, the court found the doctrine inapplicable because the party whose performance was prevented entered into the contract fully aware of the obstacles that would prevent his performance. Id. Significantly, the court did not reject the prevention defense as inapplicable to the debt agreement. Likewise, in United States v. Prince Hall Village, Inc., 597 F.Supp. 118, 121 (C.3. Ill. 1984), aff'd, 78c F.2d 597 (7th Cir. 1986), and United States v. Sherman Gardens Company, 298 F.Supp. 1332, 1334 (D. Nev. 1967), the courts rejected the prevention defense because they found that the plaintiffs had not prevented performance. Again, the opinions do not indicate that the prevention defense does not apply to notes. I therefore conclude that the New York courts would hold that the prevention doctrine applies to a note. Accordingly, defendants' claim is rejected.

f. Damages

Defendants next argue that plaintiff's proof of damages for lost profits and loss of value as a business was insufficient as a matter of law. In regard to the loss of value, defendants argue that plaintiff's calculation of its value as a going concern is suspect to the extent that it is based on a comparison with non-comparable companies such as Liz Claiborne and Leslie Fay. Defendants also challenge plaintiff's expert. The expert computed plaintiff's value for fiscal year 1988 based on gross profits for 1986; in doing so the expert ignored fiscal year 1987, during which plaintiff lost $387,000.

Appendix E

The expert reached his conclusions using figures from the fiscal year that ended February 26, 1986. Tr. 2143. He used a "normal" year, i.e., one that does not have a very high profit or a very low profit. Id. Plaintiff had net sales for fiscal year of $6,990,OOO Tr. 2175. However, for that year plaintiff had a net profit of about $700,000. Tr. 2176-77. For the fiscal year ending February 28, 1987, plaintiff had sales of $4,420,000. Tr. 2174. Also during that year plaintiff had a loss of $387,000, Tr. 2177, which, according to defendants, the expert ignored. Defendants challenge the expert's use of the fiscal year ending February 28, 1986, to estimate the value of the company. They also challenge the expert's projected profit for 1987 of $671,000 when in fact plaintiff lost $387,000 that year.

Plaintiff's expert justified his selection of 1986, a "normal" year, by explaining that if an "abnormal" year is used for valuation he would make it a normal year by eliminating a non-recurring loss or non-recurring large profit. Id.[7] In 1987, the expert continued, an embargo delayed the delivery of goods ordered by plaintiff. Tr.

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[7] The expert testified:

> What we did and what we usually do is what we call normalizing. We take a year that is a normal year, not one that had a very high profit for some reason or one that had a very low profit for another reason, such as the embargo of goods.

Tr. 2143-44.

2139, 2220. The goods embargoed had a worth of approximately $700,000, a significant sum in relation to plaintiff's overall business. Tr. 2220. As a result of the embargo, the expert estimated that plaintiff lost about a million dollars in sales on the initial order. Tr. 2226. He could not say what the amount of reorders would have been. Id.

Defendants also challenge the choice of 1986, instead of 1987 because, they say, it is improper to base lost profits damages on two-year-old profits. Adams v. Lindblad Travel, Inc., 730 F.2d 89, 92 (2d Cir. 1984). True, in Adams the court said that it was improper for the plaintiff to seek damages based on two year old profits. But in that case, the plaintiff's lost revenues were more readily measured in terms of the business taken from him by the defendants during the year at issue. Id. In the present case, there is no readily available basis to establish lost profits other than plaintiff's experience in 1986. Plaintiff's expert reasoned that because of the embargo in 1987, he would have had to make too many assumptions if he had selected that year. Tr. 2220. Thus, the expert had a reasonable basis for his choice of 1986.

The expert then computed the value of plaintiff in November of 1987 when it ceased to exist, at $4.3 million, based on its value on February 28, 1986. Tr. 2142-43, 2149. He explained that the stock of publicly held companies is valued at a certain multiple of earnings. Tr. 2146. Similarly, in assessing plaintiff's value, the expert arrived at a multiple of the company's earnings by comparing it to the multiples of other companies in the

garment industry. Id. He initially selected three multiples:5.2, 6.8, and 7.8, but he ultimately chose 5.2 because plaintiff is not one of the major companies, which could have a multiple of 11. Tr. 2146-47.

For fiscal year 1987, the expert arrived at a profit of based or. plaintiff's sales history up to 1986. Tr. 2150. He used the multiplier of 5.2 and applied a discount rate to estimate plaintiff's value at S3.45 million. Tr. 2151. That figure was at the 1ow end of the valuation and he ultimately arrived at a mid-range figure of 4.3 million. Tr. 2149

The burden of uncertainty as to the amount of damages is the test for admissibility of evidence concerning prospective damages is whether the evidence has any tendency to show their probable amount. Lamborn v. Dittmer, 873 F.2d 522, 533 (2d Cir. 1989)(quoting Contemporary Mission Inc. v. Famous Music Corp., 557 F.2d 91S, 926 (2d Cir. 1977)). As in Lamborn, the expert's projections were sufficiently sound with respect to the fact of damages because he specifically set forth the bases for his findings. Id.

Defendants argue that plaintiff's reliance on Lamborn is misplaced because the valuation methodology there differed from the methodology used by the expert here. In Lamborn, defendants say, the Second Circuit found that a valuation methodology that considers the earnings of the last six months of a company was sound. Defendants criticize plaintiff's expert because they maintain he ignored plaintiff's negative earnings for the

last full year of its operation. Yet in Lamborn, the expert based his projections on the rapid growth of revenues for the last 6 months of a partnership that was only about to break into an extended period of profitability. Id. at 533. To that time, the partnership had no history of profits. And even then, the parties disputed whether the business earned a profit in its last month of existence. In our case, plaintiff had a profit of $600,000 in the fiscal year that ended February 28, 1986. Therefore, plaintiff had some history of profits.

As for the expert's use of other, larger companies for comparison purposes, the court in Lamborn approved of that methodology. Additionally, the companies the Lamborn expert compared were not dealing exclusively in commodities trading, the business of the partnership in that case. Id. at 534. Also, the expert in the present case noted that his valuation method was a standard method performed by major companies. Tr. 2147, 2189. Public companies listed on the New York Stock Exchange, he said, are the only companies from which to obtain a multiple. Tr. 2189.

Moreover, the expert had considerable experience in the valuation of companies and accounting in the garment industry. See Enercomp. Inc. v. McCorhill Pub., Inc., 873 F.2d 536, 550 (2d Cir. 1989). "To the extent he may have departed from general valuation practices in this case or adopted procedures subject to criticism, [defendants] had ample opportunity to elicit these facts and argue them to the jury. It was then for the jury to decide, based on the expert's training, background and

procedures, whether to accept his opinion and what weight to assign to it." Id. For these reasons, plaintiff's proof Of damages as to value is not insufficient as a matter of law.

Plaintiff's proof of lost profits, though, is a different matter. Defendants challenge plaintiff's proof as speculative. See Kenford Co. v. County of Erie, 67 N.Y.2d 257, 502 N.Y.S.2d 131, 132 (1986). In New York, although plaintiff is required to establish it suffered a loss with certainty, it does not have to prove the amour. Of he loss with certainty. S & K Sales Co. v. Nike Inc., 816 F.2d 843, 852 (2d Cir. 1987). It "need only provide the jury with a sound basis for approximating with reasonable certainty the profits lost as a result of [defendants'] actions." Id.

Plaintiff's expert estimated that plaintiff lost profits in the amount of $2.6 million. Tr. 2137, 2141. He based this figure on an analysis that plaintiff prepared -- Plaintiff's Exh. 30. Tr. 2136, 2141. That exhibit, which consisted of 4 volumes, projected costs and sales and thus projected lost profits. See Tr. 394-398. The exhibit included summary sheets that listed the orders received by plaintiff, and included the date of issue, the original delivery date, the original arrival date, the number of pieces ordered, the price per piece and the total projected cost. Tr. 394. It also showed the loss on goods that never arrived,[8] or that arrived late, and the loss from expected

[8] The goods that never arrived made up the largest portion of the projected lost profits.

reorders that never materialized. Tr. 2136, 2141. In sum, the exhibit showed the orders that could not be filled because of either non-of the garments or late arrivals. See Tr. 409, 412. The expert simply added the lost profits calculated for each purchase order and arrived at t he total lost profits. See Tr. 2142.

Defendants argue that plaintiff failed to provide evidence of its variable expenses, such as customs duties, freight and insurance, in projecting its lost profits. Defendants make the same argument concerning overhead expenses, such as rent and salaries. The summary sheets listed the total projected cost of the garments to plaintiff. For example, the summary sheet shopped, in connection with P.O. 566, a price per piece of $4.63 multiplied by the number of pieces ordered, 6,000, resulting in a total projected cost of $27,780. This figure was subtracted from the total projected sales to Trendi Sportswear, Inc., resulting in the total projected loss.[9] In Exhibit 30, two pages followed the summary sheets dealing with orders that never arrived. The first page was a copy of a purchase order from Trendi to plaintiff, which indicated the price plaintiff would receive from Trendi for the garments. The second page was a copy of a purchase order from plaintiff to the foreign supplier ordering the goods. Although the order was on a Trendi form, it was actually an order from plaintiff.

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[9] Trendi Sportswear Inc. was plaintiff's primary customer and an affiliated company.

Appendix E

The summary sheet lists only the price per piece of the garments. It makes no reference to expenses for freight, insurance or custom duties. On the purchase order form to the foreign supplier, in the box entitled "Px Pc" (price per piece), however, is figure that is less than the price per piece on the summary sheet. In P.O. 566, the amount is $3.21. Plaintiff maintains that the difference between $4.63, the amount per piece in the summary sheet, and $3.21, the amount per piece in the purchase order, reflects the expenses for freight, insurance and custom duties. Thus, plaintiff argues that the jury has before it evidence of plaintiff's lost profits and its expenses.

Nevertheless, no reasonable_ juror would have been able to the discrepancy between the price per piece on the and the price per piece on the summary sheet, represented expenses. As stated, the summary sheet said nothing about expenses. Yes, the price per piece box in the copy of the purchase orders to the foreign suppliers had notations like "CNF" and "FOB" on it, but the jury cannot be expected to know the meaning of those abbreviations, let alone that such notations amounted to expenses. Indeed, it appears that plaintiff does not seriously argue that the jury could be expected to discover on its own, without being guided by testimony or other evidence, that Exhibit 30 accounted for plaintiff's expenses. Its argument centers on the testimony of its expert and its principal. That testimony, plaintiff contends, indicated that expenses were accounted for in Exhibit 30.

A review of that testimony, however, reveals little, if any, reference to expenses. Plaintiff's principal testified about the price per piece cost to plaintiff. See Tr. 396-97. He explained that "what did it cost us per piece means what did we have to pay overseas for that merchandise." Tr. 397-98. He also definer projected Costs as "how tic.. was it going to cost us to bring in this merchandise." Tr. 394. This testimony did nothing more than restate what was in the summary sheets. The witness did not mention anything about variable expenses in his testimony.

Similarly, plaintiff's expert failed to discuss to expenses. He did testify concerning profits in arriving at plaintiff's value. He said: "Well, loss of 2.6 "million] of gross profits, you would then take off normal expenses and then multiply that by a multiple to come up with the valuation." Tr. 2150. If anything, the reference to gross profits in the testimony suggests expenses were not taken into account. Plaintiff maintains that the expert's reference to gross profits was a slip of the tongue. The figure presented to the jury, plaintiff adds, was a net profit figure, not a gross profit figure. Even assuming the expert erred, the jury had no evidence of expenses before it.

Plaintiff also argues that Judge Duffy, to whom this case was initially assigned, indicated in his Memorandum and Order dated June 7, 1991, that plaintiff had made out a prima facie case as to its damages. Judge Duffy's decision, plaintiff maintains, is law of the case. In his order (at 9), Judge Duffy noted that plaintiff had "demonstrated a present ability to sustain its burden of proof as to the existence and quantum of its damages in

light of the information adduced by its latest submissions," including Exhibit 30. Judge Duffy's decision, however, did not determine whether plaintiff established its lost profits at trial. Judge Duffy merely restored plaintiff's claims after he her dismissed them for plaintiff's failure to show damages. See Memorandum and Order at 3. In doing SO, he relied on the affidavits of plaintiff's principal and accountant, neither of which were before the jury at trial. But more than that, Judge Duffy himself in the memorandum, stated that "[e]very order short of a final decree is generally subject to reopening at the discretion of the district judge." Id. at 8. Thus, the law of the case doctrine does not apply. For the foregoing reasons, plaintiff has not shown its variable expenses.

Defendants also challenge the absence in the record of any testimony concerning plaintiff's overhead expenses. Plaintiff concedes that it has not established its overhead expenses such as rent, utilities and payroll. It says, though, citing Adams v. Lindblad Travel. Inc., 730 F.2d at 93, that it does not have to do so because overhead expenses need not be deducted from gross income. Only variable expenses, plaintiff claims, need be deducted in arriving at lost profits.

Defendants distinguish Adams because the plaintiff there had already paid its fixed expenses and would have paid them regardless of the breach. But here, according to defendants, plaintiff failed to show that it had paid its overhead expenses and that it would have continued to do so despite the breach. Defendants also

argue that in this circuit, overhead costs that assist in the production, distribution or sale of a product must be factored into the profit calculation. Manufacturers Technologies Inc. v. Cams Inc., 728 F. Supp. 75, 83 (D. Conn 1989).

Manufacturers appears at odds with Adams. Adams suggests that overhead or fixed expenses are not part of the correct damage formula. 730 F.2d at 93. The court there said that the plaintiff "by definition" would have paid his fixed costs regardless of the breach. Id.; see also Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983).[10] Defendants argue that Adams does not contradict the rule set forth in Manufacturers Technologies. They point out that the plaintiff in Adams had paid his fixed costs for the year in question and those costs would have been paid despite the breach. The difficulty here concerns the absence of evidence of such expenses and the effect of the Bank's breach on them. As stated, plaintiff has not shown its overhead expenses. More important, it has not

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[10] Manufacturers Technologies states that Taylor does not represent the view of the Second Circuit. Taylor was a copyright case and Judge Posner said that costs that would be incurred regardless of the infringing activity need not be deducted from the infringers' gross revenues because those costs "by definition ... cannot be avoided by curtailing the profit-making activity." 712 F.2d at 1121. He added that this principle is well established in the treatment of overhead costs in calculating damages for breach of contract. Id. Judge Posner's view coincides with the court in Adams.

shown whether such expenses would have been affected by the Bank's breach. If the breach prevented a loss, the amount saved should be credited to the wrongdoer. R & I Electronics Inc. v. Neuman, 836, 411 N.Y.S.2d 401, 404 (2d Dep't 1978) (citation omitted) ; see also Buono Sales Inc. v. Chrysler Motors Corporation, 449 F.2d 715. 720 (3d Cir. 1971). In Adams, such evidence was before the court. Without such evidence the jury could only speculate about whether overhead expenses would have remained the same regardless of the breach. See Maxon International Inc. v. International Harvester Company, 82 A.D.2d 1006, 442 N.Y.S.2d 588, 590 (3d Dep't 1981). Consequently, plaintiff presented insufficient proof concerning its overhead expenses.

In view of plaintiff's failure to prove its expenses, it has not provided a basis for the jury to approximate lost profits with reasonable certainty. See S & K Sales, 816 F.2d at 852. Its proof of lost profits, as defendants argue, is insufficient as a matter of law. Hence, it has not shown its damages and the complaint must be dismissed.[11] Accordingly, defendants' motion to set aside the verdict is granted and judgment should be entered in defendants' favor in connection with plaintiff's case. Defendants' motion is denied with respect to the counterclaim. Therefore, the clerk is directed to modify the judgment in

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[11] Because of this ruling, the court need not consider defendants' argument that the verdict was excessive. Other challenges raised by defendants were considered at trial and rejected. They need not be revisited.

defendant's favor dismissing the complaint, but the judgment on the counterclaim should remain the same.

So ordered.

Dated: New York, New York
December 17, 1993

LEONARD BERNIKOW
United States Magistrate Judge

Appendix F - Amended Judgment of the United States District Court, Southern District of New York, Filed December 30, 1993 [Pages 78a - 79a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

INDU CRAFT, INC.,

Plaintiff,

87 CIVIL 7379 (KTD)(LB)
AMENDED
JUDGMENT

-against-

BANK OF BARODA,

Defendant and
Counterclaim Plaintiff,

KRISHNAKANT C. CHOKSHI,

Defendant.

----------X

Defendants having moved, pursuant to Rules 50 and 59, F.R.Civ.P., to set aside the jury verdict and direct the entry of judgment in favor of defendants or, in the alternative, to grant a new trial on all or part of the issues and/or remittitur, and the said motion having come before the Honorable LEONARD BERNIKOW, United States Magistrate Judge, and the Court thereafter on December 17, 1993, having rendered its opinion and order (#72510); denying defendants' motion with respect to the counterclaim, and directing the Clerk of the Court to modify the judgment in defendant's favor dismissing the complaint, but the judgment on the counterclaim should remain the same, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion with respect to the counterclaim be and it is hereby denied, and it :is further,

ORDERED, that judgment be granted in favor of Indu Craft, Inc. on Bank of Baroda's first counterclaim for breach if the Note, and it is further,

ORDERED, that judgment be granted in favor of Indu Craft, Inc. on Bank of Baroda's second counterclaim for fraudulent misrepresentation against Indu Craft, Inc., and it is further,

ORDERED, that the counterclaims be and they are hereby dismissed, and it is further,

ORDERED, that the complaint be and it is hereby dismissed for the reasons stated in the Court's Opinion and Order, dated December 17, 1993.

Dated: New York, New York
December 1993

s/_____
James M. Parkisen
Clerk

s/_____
Ronald A.
Deputy Clerk

Approved:

s/_____
Leonard Bernikow
U.S.M.J.

Appendix G - Memorandum Order of the United Sates District Court, Southern District of New York, Filed August 15, 1995 [Pages 80a - 89a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
INDU CRAFT, INC.,

Plaintiff,

-against-

MEMORANDUM ORDER

87 Civ. 7379 (SHS) (LB)

BANK OF BARODA,

Defendant and
Counterclaim Plaintiff,

KRISHNAKANT C. CHOKSHI,

Defendant.
----------X

Bernikow, U.8. Magistrate Judge:

This court's Memorandum Order, dated June 26, 1995, is hereby withdrawn. This order replaces it.

This order concerns a dispute between the parties in regard to the entry of judgment. On February 3, 1995, the Second Circuit reinstated a jury verdict awarding plaintiff $3.25 million on its contract and prima facie tort claims. 47 F.3d 490, 498. Plaintiff had claimed that the defendant Bank of Baroda ("the bank") had breached its covenant of good faith and fair dealing implied in a loan

agreement between the parties. That court also allowed the bank's $1.75 million counterclaim, the amount plaintiff owed the bank under the note, as a setoff from the damages owed to plaintiff. Id. The court made this award to avoid a windfall to plaintiff. Id. To award plaintiff its damages and relieve it from its obligation under the note, the court explained, places plaintiff "in a better economic position than it would otherwise have occupied, a result the law disfavors." Id. Accordingly, the Second Circuit remanded the matter to this court to reinstate the verdict offset by the amount of the counterclaim. Id.

One would think that the direction from the Second Circuit could be satisfied easily. Unfortunately, that has not happened due to a number of disputes between the parties. The disputes primarily concern the following three issues: (1) the application of the "interest on the balance" rule; (2) attorneys' fees; and (3) what interest, if any, should be awarded for the period after August 21, 1992, the date of this court's original judgment.

"Interest on the balance" rule

The bank contends that it is entitled to pre-judgment interest on its counterclaim at the rate specified in the loan agreement prior to any setoff. It maintains that its contractual right to recover interest under the promissory note is not changed because it obtained recovery on the note by asserting a counterclaim. Plaintiff, on the other hand, argues for the application of

the "interest on the balance" rule, i.e., that pre-judgment interest should be awarded on the net balance of the jury verdict remaining after deduction of the bank's setoff.

New York cases do not use the phrase "interest on the balance" rule, but they appear to follow the rule. See Manshul Constr. Corp. v. Dormitory Authority, 79 A.D.2d 383, 436 N.Y.S.2d 724, 727 (1st Dep't 1981); Kooperman v. Picoult, 41 A.D.2d 980, 343 N.Y.S.2d 732 (3d Dep't 1973); Sloan v. Pinafore Homes. Inc., 38 A.D.2d 718, 329 N.Y.S.2d 420, 421 (2d Dep't 1972). Plaintiff relies principally on 'Manshul, which involved a breach of a construction contract. The plaintiff construction company recovered on its claim for the balance due under the contract. 436 N.Y.S.2d at 727. The defendant also recovered on its counterclaim for credits due for work deleted or not performed. Id. The court held that the net amount owed to plaintiff is "only the gross amount of plaintiff's claim, as allowed, minus the credits allowed to defendant; and pre-decision interest should be allowed to plaintiff on that net amount." Id.

The bank argues that the court in Manshul relied on the contract language and, thus, its holding is limited to the facts of that case. Granted, the court noted that the construction contract had a provision that the contract sum would be adjusted for changes made altering or deducting from the work. Nevertheless, this provision appears to have provided an alternate basis for the court's ruling.

In any event, the bank acknowledges that the rule in Manshul is generally recognized by New York courts, but argues that it does not apply here. According to the bank, the interest on the balance rule was proper in Manshul because both parties were entitled to the same rate of interest on their respective claims. In contrast, the bank says, here, the bank is entitled to interest on the note at a floating rate ranging from 11 to 16 percent while plaintiff is entitled to the statutory rate of 9 percent. The bank also notes that it is entitled to compound interest but plaintiff to simple interest.

Contrary to the bank's assertions, however the parties in Manshul were not entitled to the same interest rate. The plaintiff could recover only four percent because the defendant was a public corporation, but the defendant was entitled to the then statutory rate of six percent. The court still permitted the setoff and interest on the net amount at the lower rate.

The bank relies on Studiengesellschaft Kohle MBH v. Novamont Corporation, 548 F. Supp. 234, 236 (S.D.N.Y. 1981), where the court calculated interest on each party's claim before any setoff. In that case, though, the parties apparently did not raise any issue concerning the court's approach. In Manshul and Sloan, the court expressly considered the issue. In Sloan, for example, the Appellate Division said lathe trial court should have offset defendant's small recovery, for costs, against the plaintiffs' larger recovery and then awarded a net judgment in plaintiffs' favor for the balance . . . plus interest." 329 N.Y.S.2d at 421. Similarly, in County

Asphalt Inc. v. Lewis Welding & Eng. Corp., 444 F.2d 372, 379 (2d Cir. 1971), the court expressly rejected the argument that the trial court exceeded the bounds of discretion in awarding pre-judgment interest on the net unpaid balance of the contract price.

But more than that, as plaintiff notes, in Ralston Purina Company v. Parsons Feed & Farm Supply Inc., 416 F.2d 207, 213 (8th Cir. 1969), a case that applied the interest on the balance rule, then Judge Blackmun stated that "when vexing problems of interest, not specified by statute, have presented themselves to the United States Supreme Court, that tribunal over the years has approached and resolved these problems in a sense of equity or fairness." Equity and fairness dictate that interest should be awarded to plaintiff on the net balance after the setoff. Clearly, plaintiff won this case. The Court of Appeals permitted the bank to recover on its counterclaim only to avoid a windfall to plaintiff. That court upheld the jury's finding that the bank and the other defendant drove plaintiff out of business. The jury found for plaintiff on its breach of contract claim and on its prima facie tort claim. To award the bank pre-judgment interest on its counterclaim would be inequitable and would indeed result in a windfall--but this time in the bank's favor. Thus, interest should be awarded to plaintiff on the net balance after the setoff.

Attorneys' fees

The bank seeks its attorneys' fees, under a provision in the loan agreement, in the sum of

$2,119,512.50 plus $388,262.74 in disbursements. With interest on the attorneys' fees and disbursements in the sum of $842,520.46, the bank asks for $3,350,295.60 in attorneys' fees. The bank argues it is entitled to attorneys' fees because it recovered on its counterclaim. The letter agreement between the parties provided: "If an attorney is used to enforce or collect on this note, the undersigned shall be obligated to pay all costs and expenses of collection, including reasonable attorneys' fees."

Many of the same considerations noted above in connection with the dispute about interest apply here. It would be inequitable and unreasonable to award attorneys' fees to a party that acted improperly. See United States v. A.V. De Blasio Constr. Inc., 588 F.2d 259, 263 (9th Cir. 1978). As indicated, the jury found that the bank acted improperly. The Second Circuit observed that the conduct of defendants drove plaintiff out of business. 47 F.3d at 497.

Moreover, attorneys' fees are awarded to the prevailing party. See F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1263 (2d Cir. 1987). Notwithstanding its assertion to the contrary, the bank was not the prevailing party. The Court of Appeals permitted the bank to recover on its counterclaim, but, as noted, only to avoid a windfall. Thus, the bank's reliance on Towers Charter & Marine v. Cadillac Ins. Co., 894 F.2d 516, 524 (2d Cir. 1990), is misplaced. In that case, the defendant recovered on its counterclaim, on a note, and obtained its attorneys' fees and costs. But there the

defendant was the prevailing party; it recovered on the note while plaintiff recovered nothing.

Citing Turecamo Maritime. Inc. v. Weeks Dredge No. 516, 1995 WL 110392. *1 (S.D.N.Y. March 14, 1995), and Group v. General Motors Core., 612 F. Supp. 1375, 1378 (S.D.N.Y. 1985), the bank argues that courts have held that a prevailing party is a party who has obtained some relief in an action, even if the party has not sustained all of its claims. Since it recovered on its counterclaim, the bank reasons that it succeeded on a significant issue in this litigation.

The cases the bank relies on stand for the proposition cited, but are inapposite. These cases awarded attorney's fees or costs to plaintiffs that succeeded on some part of their claims. They did not involve any counterclaims. And while attorneys' fees may be awarded to a successful counterclaimant where the plaintiff recovers nothing or less than defendant, that is not the case here since the bank's recovery was permitted only as a setoff against plaintiff's larger jury award. See Goldman v. Burch, 780 F. Supp. 1441, 1446 (S.D.N.Y. 1992) (citing 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil § 2667 at 191 (1983) ("a successful counterclaimant generally will be considered the prevailing party when plaintiff fails to recover or is awarded less than defendant receives on the counterclaim."). Therefore, the bank's request for attorneys' fee is denied.

Interest for the period after the original judgment

After the jury handed down its verdict for plaintiff, the court, entered judgment on the verdict on August 21, 1992. Thereafter, the court modified the judgment by dismissing the complaint. The parties apparently agree that plaintiff is entitled to pre-judgment interest for the period before this court's original judgment of August 21, 1992. The question is what interest, if any, should be awarded for the period after that date.

Plaintiff maintains that for this period it is entitled to interest at the state pre-judgment interest rate, which is higher than the federal post-judgment rate. Plaintiff concedes that it has provided no authority for its position, but argues that it should not be penalized for the lapse of time between the original judgment and the final judgment by being denied pre-judgment interest for that period. Defendants contend that this court has no authority to award interest for the period after the original judgment, and that plaintiff may seek post-judgment interest for that period only by seeking recall of the Second Circuit's mandate of February 3, 1995.

The court agrees with defendants. Rule 37 of the Federal Rules of Appellate Procedure provides, in pertinent part: "If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, 1he mandate shall contain instructions with respect to allowance of interest." In this case, the mandate of the Court of Appeals did not address interest. The Supreme Court has held that where the mandate of the court of appeals makes no provision for interest from the

date of the verdict to the date of entry of the judgment directed by the mandate, the district court has "no power to enter judgment for an amount different than directed." Brigges v. Pennsylvania R. Co., 334 U.S. 304, 306 (1948). And the Advisory Committee Note to Rule 37 explains that the quoted portion of Rule 37 is "a reminder to the court, the clerk and counsel of the Briggs rule," and states further:

> Since the rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

Accordingly, this court cannot award interest to plaintiff for the period after the original judgment. Plaintiff may pursue its desired result only by seeking recall of the mandate of the Court of Appeals.

Conclusion

For the reasons stated, the court finds that plaintiff is entitled to interest on the net balance after the setoff, that the bank is not entitled to attorneys' fees, and that the court cannot award plaintiff interest from August 21, 1992. In addition, this Memorandum Order replaces this court's previous Memorandum Order, dated June 26, 1995.

Settle judgment on two days' notice

So ordered.

Dated: New York, New York
August 10, 1995

LEONARD BERNIKOW
United States Magistrate Judge

Appendix H - Judgment of the United States District Court, Southern District of New York, Filed August 17, 1995 [Pages 90a - 94a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

INDU CRAFT, INC.,
(LB)

87 Civ. 7379 (KTD)

Plaintiff,

JUDGMENT

-against-

BANK OF BARODA and
KRISHNAKANT C. CHOKSHI,

Defendants.

----------x

A jury trial before the Hon. Leonard Bernikow, United States Magistrate Judge, having begun on July 13, 1992, and at the conclusion of the trial the jury having answered the attached Verdict Sheet; and the jury in so doing having returned a verdict in favor of plaintiff Indu Craft, Inc. on its breach of contract claim in the amount of $2,000,000 and on its prima facie tort claim in the amount of $1,250,000 for a total amount of $3,250,000, and having returned a verdict in favor of Bank of Baroda and Krishnakant C. Chokshi on Indu Craft Inc.'s

tortious interference with contract claim; and judgment having been entered on August 21, 1992 against the Bank of Baroda in the amount of $2,921,698.63 and against the Bank of Baroda and Krishnakant C. Chokshi in the amount of $1,826,061.64 and the counterclaims having been dismissed; and defendants having moved to set aside the jury verdict and for judgment as a matter of law or, alternatively, a new trial; and by decision dated December 17, 1993 the Hon. Leonard Bernikow having directed that the judgment be modified by dismissing the complaint; and plaintiff and Bank of Baroda having appealed to the United States Court of Appeals for the Second Circuit; and by decision dated February 3, 1995, the Second Circuit having reversed the decision of the District Court and directed the District court to reinstate the jury verdicts on plaintiff's breach of contract and Prima facie tort causes of action totalling $3.25 million and to offset against this total the amount due Bank of Baroda under its promissory note by granting the Bank of Baroda's motion for judgment under its contract counterclaim; and the Bank of Baroda having moved in the District Court for an award of interest and attorneys' fees with respect to its counterclaim; and the District Court having issued a memorandum order dated June 26, 1995 denying the motion of defendants for interest and attorneys' fees under the promissory note and directing that interest be awarded to plaintiff on the amount of its recovery less the amount of the setoff; and by oral ruling dated July 27, 1995, the District Court having ruled

that the interest rate applicable to the judgment for the period from August 21, 1992, the date of entry of the original judgment, to date is the rate of 3.41% in effect immediately prior to August 21, 1992 under 28 U.S.C. §1961 rather than the state court rate of 9% or the federal rate in effect immediately prior to the entry of the judgment after remand; and by oral ruling dated July 28, 1995, the District Court having withdrawn its oral ruling of July 27, 1995; and by memorandum order dated August 10, 1995, the District Court having withdrawn its memorandum order of June 26, 1995, and denied the motion of defendants for interest and attorneys' fees under the promissory note and directed that interest be awarded to plaintiff on the amount of its recovery less the amount of the setoff and having ruled that it was without power to award interest on the judgment for the period from August 21, 1992 to the date of entry of judgment; and the parties having stipulated that the principal amount due on the promissory note executed by Indu Craft, Inc. in favor of Bank of Baroda is $1,712,028.47 and the parties having stipulated that the amount of Indu Craft, Inc.'s costs is $22,500; it is hereby

ORDERED, ADJUDGED AND DECREED: that damages be awarded in favor of plaintiff Indu Craft, Inc. and against defendant Bank of Baroda in the amount of S2,000,000 reduced by the amount of $1,712,028.47 awarded to Bank of Baroda on its counterclaim, leaving a balance of $287,971.53 plus interest at 9% from July 9, 1987 through August 21,

1992 in the amount of $132,640.48, for a sum of $420,612.01;

ORDERED, ADJUDGED AND DECREED: that damages be awarded in favor of plaintiff Indu Craft, Inc. against defendants Bank of Baroda **and Krishnakant** C. Chokshi jointly and severally in the amount of $1,25O,000, plus interest at 9% from July 9, 1987 through August 21, 1992 in the amount of $575,753.42, for a sum of $1,825,753.42; and it is further

ORDERED, ADJUDGED AND DECREED: that judgment be granted in favor of Bank of Baroda on the first counterclaim in the stipulated amount of $1,712,028.47 and set off against plaintiffs breach of contract claim as set forth above; and it is further

ORDERED, ADJUDGED AND DECREED: that judgment be granted in favor of Bank of Baroda and Krishnakant C. Chokshi on Indu Craft, Inc.'s tortious interference with contract claim; and it is further

ORDERED, ADJUDGED AND DECREED: that judgment be granted in favor of Indu Craft, Inc. on Bank of Baroda's second counterclaim for fraudulent misrepresentation; and it is further

ORDERED, ADJUDGED AND DECREED: that the remaining counterclaims be and they are hereby dismissed; and it is further

Appendix H

ORDERED, ADJUDGED AND DECREED: that Indu Craft, Inc. recover from Bank of Baroda and Krishnakant C. Chokshi costs of this action in the stipulated amount of $22,500.00.

Dated: New York, New York
August 16, 1995

Approved:

_____
Clerk

_____
U.S.M.J.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON_____

Appendix I - Judgment of the United States District Court, Southern District of New York, Filed August 21, 1992 [Pages 95a - 96a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

INDU CRAFT,

87 CIV 7379 (KTD)(LB)
JUDGMENT

Plaintiff,

-against-

BANK OF BARODA, et al.,

Defendants.

----------x

A jury trial before the Honorable LEONARD BERNIKOW, United States Magistrate Judge, having begun on July 13, 1992, and at the conclusion of the trial the jury having answered the attached "Verdict Sheet"; and the jury in so doing having returned a verdict in favor of the plaintiff Indu Craft, in the amount of $3,250,000.00, and it is,

ORDERED, ADJUDGED AND DECREED: That damages be awarded in favor of plaintiff Indu Craft, and against defendant the Bank of Baroda, in the amount of $2,000,000.00, plus interest at 9% from July 9, 1987, through August 21, 1992 in the amount of $921,698.63, for a sum of $2,921,698.63, and it is further,

ORDERED: That damages be awarded in favor of plaintiff Indu Craft, and against defendants the Bank of Baroda, and Mr. Chokshi, in the amount of $1,250,000.00, plus interest at 9% from July 9, 1987, through August 21, 1992, in the amount of $57,061.64 for a sum of $1,826,061.64, and it is,

ORDERED: That judgment be granted in favor of Indu Craft, on the Bank of Baroda's, first counterclaim for breach of the Note, and it is further,

ORDERED: That judgment be granted in favor of Indu Craft, on the Bank of Baroda's, second counterclaim for fraudulent misrepresentation against Indu Craft.

ORDERED: That the counterclaims be and they are hereby dismissed.

Dated: New York, New York
August 21, 1992

Approved:

s/_____
James M. Parkisen
Clerk

s/_____
Leonard Bernikow
U.S.M.J.

Appendix J - Amended Judgment of the United States District Court, Southern District of New York, Filed October 18, 1995 [Pages 97a - 101a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

INDU CRAFT, INC.,

Plaintiff,

-against-

BANK OF BARODA and
KRISHNAKANT C. CHOKSHI,

Defendants.
----------X

87 Civ. 7379(SHS)(LB)

AMENDED

JUDGMENT

A jury trial before the Hon. Leonard Bernikow, United States Magistrate Judge, having begun on July 13, 1992, and at the conclusion of the trial the jury having answered the attached Verdict Sheet; and the jury in so doing having returned a verdict in favor of plaintiff Indu Craft, Inc. on its breach of contract claim in the amount of $2,000,000 and on its prima facie tort claim in the amount of $1,250,000 for a total amount of $3,250,000, and having returned a verdict in favor of Bank of Baroda and Krishnakant C. Chokshi on Indu Craft Inc.'s tortious interference with contract claim; and judgment having been entered on August 21, 1992 against the Bank of Baroda in the amount of $2,921,698.63 and against the

Bank of Baroda and Krishnakant C. Chokshi in the amount of $1,826,061.64 and the counterclaims having been dismissed; and defendants having moved to set aside the jury verdict and for judgment as a matter of law or, alternatively, a new trial; and by decision dated December 17, 1993 the Hon. Leonard Bernikow having directed that the judgment be modified by dismissing the complaint; and plaintiff and Bank of Baroda having appealed to the United States Court of Appeals for the Second Circuit; and by decision dated February 3, 1995, the Second Circuit having reversed the decision of the District Court and directed the District Court to reinstate the jury verdicts on plaintiff's breach of contract and prima facie tort causes of action totaling $3.25 million and to offset against this total the amount due Bank of Baroda under its promissory note by granting the Bank of Baroda's motion for judgment under its contract counterclaim; and the Bank of Baroda having moved in the District Court for an award of interest and attorneys' fees with respect to its counterclaim; and the District Court having issued a memorandum order dated June 26, 1995 denying the motion of defendants for interest and attorneys' fees under the promissory note and directing that interest be awarded to plaintiff on the amount of its recovery less the amount of the setoff; and by oral ruling dated July 27, 1995, the District Court having ruled that the interest rate applicable to the judgment for the period from August 21, 1992, the date of entry of the original judgment, to date is the rate of 3.41% in effect immediately prior to August 21, 1992 under 28 U.S.C. §1961 rather than the state court rate of 9% or the federal rate in effect immediately prior to the entry of the judgment after remand; and by oral ruling

dated July 28,1995, the District Court having withdrawn its oral ruling of July 27, 1995; and by memorandum order dated August 10, 1995, the District Court having withdrawn its memorandum order of June 26, 1995, and denied the motion of defendants for interest and attorneys' fees under the promissory note and directed that interest be awarded to plaintiff on the amount of its recovery less the amount of setoff and Slaving ruled that it was without power to award interest on the judgment for the period from August 21, 1992 to the date of entry of judgment; and by decision filed on October 4, 1995, the United States Court of Appeals for the Second Circuit having directed the District Court to award plaintiff post-judgment interest at the applicable federal rate from August 21, 1992, the date of the original judgment in the trial court; and the parties having stipulated that the principal amount due on the promissory note executed by Indu Craft, Inc. in favor of Bank of Baroda is $1,712,028.47 and the parties having stipulated that the amount of Indu Craft, Inc.'s costs is $22, 500; it is hereby

ORDERED, ADJUDGED AND DECREED: that damages be awarded in favor of plaintiff Indu Craft, Inc. and against defendant Bank of Baroda in the amount of $2,000,000 reduced by the amount of $1,712,028.47 awarded to Bank of Baroda on its counterclaim, leaving a balance of $287,971.53 plus interest at 9% from July 9, 1987 through August 21, 1992 in the amount of 5132,640.48, for a sum of $420,612.01, plus post-judgment interest on said sum from August 21, 1992 to October 18, 1995, the date of entry of this judgment, at the federal rate of 3.41% per year in the amount of

$46,989.45 for a total sum on plaintiff's breach of contract claim of contract claim of $467,601.46; and it is further

ORDERED, ADJUDGED AND DECREED: that damages be awarded in favor of plaintiff Indu Craft, Inc. against defendants Bank of Baroda and Krishnakant C. Chokshi jointly and severally in the amount of $1,250,000, plus interest at 9% from July 9, 1987 through August 21, 1992 in the amount of $575,753.42, for a sum of $1,825,753.42, plus post-judgment interest on said sum from August 21, 1992 to October 18, 1995, the date of entry of this judgment, at the federal rate of 3.41% per year in the amount of $203,967.41, for a total sum on plaintiff's prima facie tort claim of $2,019,720.83; and it is further

ORDERED, ADJUDGED AND DECREED: that judgment be granted in favor of Bank of Baroda on the first counterclaim in the stipulated amount of $1,712,028.47 and set off against plaintiff's breach of contract claim as set forth above; and it is further

ORDERED, ADJUDGED AND DECREED: that judgment be granted in favor of Bank of Baroda and Krishnakant C. Chokshi on Indu Craft, Inc.'s tortious interference with contract claim; and it is further

ORDERED, ADJUDGED AND DECREED: that judgment be granted in favor of Indu Craft, Inc. on Bank of Baroda's second counterclaim for fraudulent misrepresentation; and it is further

ORDERED, ADJUDGED AND DECREED: that the remaining counterclaims be and they are hereby dismissed; and it is further

ORDERED, ADJUDGED AND DECREED: that Indu Craft, Inc. recover from Bank of Baroda and Krishnakant C. Chokshi costs of this action in the stipulated amount of $22,500.00.

Dated: New York, New York
October 18, 1995

Approved:

_____
Clerk

_____
Deputy Clerk

s/_____
Leonard Bernikow
U.S.M.J.

Appendix K - Order of the United States Court of Appeal on Rehearing, Filed July 12, 1996 [Pages 102a - 103a]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of July one thousand nine hundred and six.

Present:

Hon. <Cardamone>

Hon. <Walker>

Hon. <McLaughlin>

Indu Craft, Inc.

Appellee-Cross-Appellant

No. 95-7865

v.

Bank of Baroda

Appellant-Cross-Appellee

A petition for rehearing having been filed herein by Jonathan Chase attorney for Indu Craft, Inc.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III, Clerk
By:_____
Beth J. Meador,
Administrative Attorney

Filed: July 12, 1996

Appendix L - Verdict Sheet [Pages 104a - 115a]

Verdict Sheet

To assist you, you will have a list of questions for each of you to answer. Your decision on each question must be unanimous. The questions must be answered in order.

A. In determining the liability of the Bank to Indu Craft with respect to Indu Craft's first claim for breach of the implied covenant of good faith and fair dealing in the Loan Agreements, you must answer the following questions:

1. On or after March 30, 1987, did the Bank or any of its employees reduce or effectively cancel Indu Craft's line of credit in an unfair manner to avenge Mr. Mehta 's refusal to Avert in ICCS?

(i) Yes ___x___
(ii) No _____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank. If your answer is yes, then you must proceed to the next question.

2. On or after March 30, 1987, did the Bank reduce or effectively cancel Indo Craft's line of credit in bad faith or unfairly?

(i) Yes __x_____
(ii) No _____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank. If your answer is yes, then you must proceed to the next question.

3. On March 30, 1987, was Indu Craft substantially in compliance with the material terms of the loan agreement?

(i) Yes __x__
(ii) No _____

If your answer is yes, then you must proceed to the next question, and enter a verdict in favor of the Indu Craft, If your answer is no, then you must proceed to the next question and enter a verdict in favor of the Bank.

4. on Indu craft's first claim for breach of the implied covenant of good faith and fair dealing in the Loan Agreements, your verdict is:

(i) For Indu craft _____x_____
(ii) For Bank of Baroda _____

5. (Only to be answered if your answer to Question No. 4 is for Indu Craft.) We find that Indu Craft has been damaged in the sum of $3 Million.

6. (Only to be answered if your answer to Question No. 4 is for Indu Craft,) In Indu Craft's claim for breach of the implied covenant of goad faith and fair dealing in

Appendix L

the Loan Agreements, did Indu Craft properly mitigate its damages?

(i) Yes _____
(ii) No __x____

7. (Only to be answered if your answer to Question No, 4 is for Indu Craft.) If Indu Craft did not properly mitigate its damages, how much of a reduction should there be in its claimed damages? $1 million.

Therefore, our verdict for Indu Craft on its claim for breach of the implied covenant of good faith and fair dealing in the Loan Agreements is the sum of damages in Question No. 5, less the reduction for failure to mitigate in Question No. 7, or $2 million.

B. In determining the liability of the Bank and Mr. Chokshi to Indu craft with respect to Indu Craft's claim for tortious interference with contract, you must answer the following questions:

1. Did the Bank and/or Mr. Chokshi take any action with respect to the Indu Craft account on or after March 30, 1987 for the reason that Mr. Chokshi wanted to avenge Mr. Mehta's rejection of the ICCS business proposal?

(i) Yes __x____
(ii) No _____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank and Mr. Chokshi. If your answer is yes, then you must proceed to the next question.

2. Did Indu Craft have any valid contracts with Trendi on or after March 30, 1987?

(i) Yes __x__
(ii) No _____

If your answer in no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank and Mr. Chokshi. It your answer is yes, then you must proceed to the next question.

3. Were the Bank and Mr. Chokshi actually aware of the existence of contracts Indu Craft had with Trendi on or after March 30, 1987?

(i) Yes __x__
(ii) No _____

If your answer is no, you must proceed no further on thin claim and you must enter verdict in favor of the Bank and Mr. Chokshi. If your answer is yes, then you must proceed to the next question.

4. Were the Bank's and Mr. Chokshi's actions deliberate? . That is, did they intend to interfere with Indu Craft's contracts with Trendi?

Appendix L

(i) Yes _____
(ii) No __x__

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank and Mr. Chokshi. If your answer is yes, then you must proceed to the next question.

5. Were any of Indu Craft's contracts with Trendi breached as a direct result of the actions of the Bank and Mr. Chokshi?

(i) Yes____
(ii) No____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank and Mr. Chokshi. If your answer is yes, then you must proceed to the next question and enter a verdict in favor of Indu Craft.

6. In Indu Craft's second claim against the Bank and Mr. Chokshi for tortious interference with contract, our verdict is:

(i) For Indu Craft____
(ii) For Bank of Baroda and Mr. Chokshi_x__

7. (Only to be answered if your Answer to Question No. 6 is for Indu Craft.) We find that Indu Craft should recover damages in the following amounts.

Lost Profits (if proven)

$_____

Loss of Value of Business as a Going Concern (if proven)

$_____

8. (Only to be answered if your answer to Question No. 6 is for Indu Craft.) On Indu Craft 's claim for tortious interference, did Indu Craft properly mitigate its damages?

(i) Yes____
(ii) No ____

9. (Only to be answered if your answer to Question No. 8 is no.) If Indu Craft did not properly mitigate its damages, how much of a reduction should there be in its claimed damages $ _____.

10 . (Only to be answered if your answer to Question No. 6 is for Indu Craft.) We find punitive damages for Indu Craft in the sum of $_____.

Therefore, our verdict for Indu Craft on its claim for tortious interference with contract is the total damages in question No. 7, less the reduction for failure to mitigate in question No. 9, plus the punitive damages, if any, in Question No . 10, or $_____.

C. If your answer to B. 6. is for Indu Craft then you. may not answer any questions in this Section C.

Appendix L

In determining the liability of the Bank and Mr. Chokshi to Indu Craft with respect to Indu Craft' s claim for prima facie tort, you must answer the following questions:

1. Did the Bank and/or Mr. Chokshi take any action with respect to the Indu Craft account on or after March 30, 1987 for the reason that Mr. Chokshi wanted to avenge Mr. Mehta' s rejection of the ICCS business proposal?

(i) Yes ___x___
(ii) No _____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank and Mr. Chokshi. If your answer is yes, then you must proceed to the next question.

2. Were the Bank' s and Mr. Chokshi ' s actions in reducing or cancelling the line of credit and declining to open or amend letters of credit for Indu Craft on or after March 30, 1987 done with malice, that is without any business justification and solely to injure Indu Craft?

(i) Yes ___x___
(ii) No _____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the

Bank and Mr. Chokshi, If your answer is yes, then you must proceed to the next question.

3 On Indu Craft's third claim for prima facie tort against the bank and Mr. Chokshi, our verdict is.

(i) For Indu Craft____x_____
(ii) For Bank of Baroda and Mr. Chokshi_____

4. (Only to be answered if your answer to Question No. 3 is for Indu Craft.) we find that Indu Craft may recover special damages in the sum of $ 1.25 million.

5. (Only to be answered if your answer to Question No. 3 is for Indu Craft.) In Indu Craft's claim for prima facie tort, did Indu Craft properly mitigate its damages?

(i) Yes ___x___
(ii) No _____

6. (Only to be answered if your answer to Question No. 5 is no.) If Indu Craft did not properly mitigate its damages, how much of a reduction in its claimed damages? $_____.

Therefore, our verdict for Indu Craft on its claim for prima facie tort is the sum of special damages in Question No. 4 less the reduction for failure to mitigate in Question No. 6, or $ 1.25 million.

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D. In determining the liability of Indu Craft to the Bank under the Bank's first counterclaim for breach of the Note, you must answer the following questions:

1. Did the Bank or Mr. Chokshi wrongfully interfere with and prevent Indu Craft from fully repaying the Bank?

(i) Yes ___x___
(ii) No _____

If your answer is yes, you must proceed no further on this claim and you must enter a verdict in favor of Indu Craft. If your answer is no, then you must proceed to the next question, and enter a verdict in favor of the Bank.

2. On the Bank's first counterclaim for breach of the Note against Indu Craft, our verdict is:

(i) For Indu Craft ___x_____
(it) For Bank of Baroda _____

3. (Only to be answered if your answer to Question No, 4 is for the Bank.) We find that Bank may recover its damages in the sum of $1,764,000.

E. In determining the liability of Indu Craft to the Bank under the Bank's counterclaim for misrepresentation based on the June 16, 1986 letter, you must answer the following questions:

1. Did Indu Craft represent to the Bank in its June 16, 1986 letter that its sales for its fiscal year ending February 1986 were $6. 9 million?

(i) Yes ___x___
(ii) No _____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of Inclu Craft. If your answer is yes, then you must proceed to the next question.

2. Was Indu Craft's representation to the Bank in the June 16, 1986 letter that its sales for its fiscal year ending February 1986 were $6. 9 million true?

(i) Yes ___x___
(ii) No _____

If your answer is yes, you must proceed no further on this claim and you must enter a verdict in favor of Indu Craft. If your answer is no, then you must proceed to the next question.

3. Did Indu Craft intend to deceive the Bank when it made the representation?

(i) Yes ____
(ii) No ____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the

Appendix L

Indu Craft. If your answer is yes, then you must proceed to the next question.

4. Did the Bank believe Indu Craft's representation and justifiably rely on it in increasing Indu Craft's line of credit to $2.7 million?

(i) Yes_____
(ii) No_____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Indu Craft. If your answer is yes, then you must proceed to the next question.

5. Did the Bank lose money an a result of its reliance on Indu Craft's representations?

(i) Yes_____
(ii) No ____

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Indu Craft. If your answer is yes, then you must proceed to the next question, and enter a verdict in favor of the Bank.

6. In the Bank's counterclaim for fraudulent misrepresentation against Indu Craft, our verdict is:

(i) For Indu Craft ____x_____
(ii) Far Bank of Baroda and Mr. Chokshi____

7. (Only to be answered if your answer to Question No 6 is for the Bank.) We find that Bank may recover its damages in the sum of $_____.

8. (Only to be answered if your answer to Question No, 6 is for the Bank.) We find punitive damages for The Bank in the sum of $_____.

Therefore, our verdict for the Bank on its counterclaim for fraudulent misrepresentation in the sum of damages in Question No. 7 plus the sum of punitive damages in Question No. 8, or $_____.

s/_____
J. Kellett

Supreme Court, U.S.
FILED
NOV 15 1996
CLERK

No. 96-606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

INDU CRAFT, INC.,

Petitioner,

vs.

BANK OF BARODA and KRISHNAKANT C. CHOKSHI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTANCE M. BOLAND*
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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the Re-Examination Clause of the Seventh Amendment of the United States Constitution prohibit the Court of Appeals from ordering an equitable set-off that does not disturb the jury verdict?

2. Should a federal court exercising diversity jurisdiction award post-judgment interest under the federal interest statute, 28 U.S.C. section 1961, or under applicable state law?

3. Should post-judgment interest under 28 U.S.C. section 1961 commence from the date of: (a) the original judgment entered after the jury verdict, which was set aside by the trial court and later reinstated by the Court of Appeals; or (b) the final judgment entered after reversal and remand by the Court of Appeals?

4. May pre-judgment interest be compounded under New York law where the petitioner failed to raise the issue before the trial court?

5. When a plaintiff recovers on a prima facie tort claim, can the District Court dismiss that portion of the claim which seeks punitive damages as a matter of law?

LIST OF PARTIES

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Bank of Baroda states that it is wholly owned by the government of India and has no corporate parent or subsidiary. Respondent Krishnakant C. Chokshi is a natural person having no corporate parent or subsidiary.

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No. 96-606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

INDU CRAFT, INC.,

Petitioner,

vs.

BANK OF BARODA and KRISHNAKANT C. CHOKSHI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Indu Craft, Inc. ("Petitioner") is a New York corporation that imported ladies' sportswear from the Far East and sold those goods wholesale in the United States. App. A at 4a.[1] Respondent Bank of Baroda (the "Bank") is owned and

[1] The Appendices to the Petition for Writ of Certiorari shall be cited as "App. __ at __."

operated by the government of India and is licensed to do business in New York. App. C at 21a. Krishnakant C. Chokshi, now a retired officer of the Bank, is also a Respondent to this Petition.

Petitioner's relationship with the Bank began in 1983 when it was granted a $500,000 line of credit. App. A at 5a. The line was periodically increased, reaching $2.7 million by 1986. *Id.*

As security for the line of credit, Petitioner, among other things, executed a promissory note dated December 15, 1986 in favor of the Bank in the amount of $2.7 million (the "Note"). App. C at 22a. Under the terms of the Note, due to Petitioner's default, the Bank was entitled to default interest and attorneys' fees incurred in recovery of the balance due under the Note. App. C at 23a.

On or about March 31, 1987, the Bank reduced the maximum amount of credit it was willing to extend to Petitioner from $2.7 million to $2.3 million. App. A at 6a. Consequently, on October 15, 1987, Petitioner commenced this action in the United States District Court for the Southern District of New York (the "District Court"), in which it alleged that the Bank and Mr. Chokshi reduced the line of credit in bad faith. App. A at 3a. The Bank counterclaimed against Petitioner for, among other things, the amount due on the Note, which exceeded $1.7 million. *Id.*

On August 21, 1992, following a jury trial, judgment was entered against the Bank and Mr. Chokshi in the amount of $4,747,760.27. App. A at 7a. The judgment consisted of a $2 million award against the Bank on a breach of contract claim and a $1.25 million award against the Bank and Mr. Chokshi on a prima facie tort claim, plus pre-judgment interest. *Id.* Pursuant to the jury verdict, the judgment dismissed all of the Bank's counterclaims, including the claim under the Note. *Id.*

On December 17, 1993, the District Court granted the post-trial motions of the Bank and Mr. Chokshi, set aside the jury verdict on the breach of contract and prima facie tort claims,

and dismissed the complaint of Petitioner on the ground that Petitioner failed to prove damages at trial. App. A at 3a. However, the District Court also denied the Bank's motion to set aside the jury verdict on its counterclaims and to enter judgment on the Note. *Id.* The decision of the District Court was appealed by both parties to the United States Court of Appeals for the Second Circuit (the "Second Circuit").

On February 3, 1995, the Second Circuit reversed the District Court's decision, reinstated the jury verdict in favor of Petitioner and against the Bank and Mr. Chokshi in the amount of $3.25 million, and awarded the Bank recovery on the Note. App. A at 2a-17a. The Second Circuit instructed the District Court to enter a judgment consistent with its February 3, 1995 decision. App. A at 17a. On February 17, 1995, Petitioner filed a Petition for Rehearing with the Second Circuit seeking recovery of punitive damages on its prima facie tort claim. On March 22, 1995, the Second Circuit denied Petitioner's Petition for Rehearing without opinion.

On April 26, 1995, the Bank moved before the District Court for an award of interest and attorneys' fees pursuant to the Note. App. C at 23a. The District Court denied the Bank's motion for interest and attorneys' fees on the Note and off-set the $3.25 million jury verdict by only the principal amount due on the Note of $1.7 million. *Id.* Accordingly, judgment in the amount of $2,268,865.43, which included pre-judgment interest, was entered on August 18, 1995. *Id.* Thereafter, on October 19, 1995, the judgment was amended to include post-judgment interest at the applicable federal rate of 3.41 percent from August 21, 1992 to October 19, 1995. The amended judgment amount is $2,519,822.29. App. C at 24a. On June 13, 1996, the Second Circuit issued a written opinion affirming the amended judgment entered by the District Court. App. C at 20a-33a.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD NOT BE GRANTED ON THE ISSUE OF WHETHER THE SECOND CIRCUIT'S EQUITABLE SET-OFF VIOLATES THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT.

A. This Issue Was Never Raised Or Considered Below.

Petitioner admits that it never raised below the issue of whether the Second Circuit's equitable set-off violated the Re-Examination Clause of the Seventh Amendment. *See* Petitioner's Brief[2] at 13 n.4. To preserve its right to appeal to this Court, Petitioner should have moved for rehearing on this issue pursuant to Rules 35(b) or 40 of the Federal Rules of Appellate Procedure following the February 3, 1995 decision of the Second Circuit. This Court has often held that it would not address arguments that were not raised or considered below. *See, e.g., Holly Farms Corp. v. National Labor Relations Bd.*, __ U.S. __, 116 S. Ct. 1396, 1402 n.7 (1996); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, __ U.S. __, 116 S. Ct. 873, 880 n.5 (1996); *Department of Revenue of Montana v. Kurth Ranch*, __ U.S. __, 114 S. Ct. 1937, 1942 n.9 (1994); *United States v. Alvarez-Sanchez*, __ U.S. __, 114 S. Ct. 1599, 1605 n.5 (1994); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, Petitioner has not identified any exceptional circumstances to persuade the Court to address this issue. Thus, this Court should not grant certiorari on the ground that Petitioner has waived its right to appeal this issue.

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[2] References to the Petition for Writ of Certiorari shall be cited as, "Petitioner's Brief at __."

B. The Second Circuit's Action In Ordering An Equitable Set-Off Was Consistent With Prior Decisions Of This Court Regarding The Seventh Amendment.

This Court has long held that the Seventh Amendment right to a jury trial only applies to legal, not equitable actions. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-41 (1989) (citing *Parsons v. Bedford*, 3 Pet. 433 (1830)); *Tull v. United States*, 481 U.S. 412, 417 (1987). In determining whether a right to a jury trial attaches, a court must "examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S. at 42; *Tull*, 481 U.S. at 417-18.

It is also well-established under decisions of this Court that remedies for restitution or disgorgement of improper profits are equitable in nature. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) ("we have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'"); *Tull*, 481 U.S. at 425 ("an action for disgorgement of improper profits [is] traditionally considered an equitable remedy" and "[r]estitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'"); *Curtis v. Loether*, 415 U.S. 189, 197 (1974) (backpay, a form of restitution, is an equitable remedy); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) ("[r]estitution . . . lies within that equitable jurisdiction.").

Where an action involves both legal and equitable claims or remedies, this Court has instructed that the legal issues should first be tried by a jury, and the equitable issues are to be subsequently determined by the judge after the jury verdict. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962).

Here, the Second Circuit ruled that it had ordered an equitable set-off to avoid giving Petitioner a windfall and to "place Indu Craft in the position it would have been in but for

the Bank's breach of contract." App. A at 17a; App. C at 27a. In its second decision, the Second Circuit explicitly stated that the set-off was *equitable* in nature, stating that "[i]n sum, our direction to reduce Indu Craft's award by the amount of Baroda's counterclaim was based on *equitable principles* . . . ." App. C at 27a (emphasis added). The Second Circuit did not disturb the jury's verdict denying the Bank recovery on the Note. App. A at 16a-17a. Indeed, had the Second Circuit disturbed the jury verdict, as Petitioner contends, the Second Circuit would have awarded the Bank interest and attorneys' fees on the Note. However, the Second Circuit explicitly stated that the Bank was not entitled to recover interest and attorneys' fees on the Note because "[i]t is plain that we did not disturb the jury's finding that Baroda's bad faith in reducing the credit line caused Indu Craft's inability to honor the promissory note. Rather, we allowed the set-off simply to avoid a windfall to Indu Craft." App. C at 27a. In sum, the Second Circuit's decision did not violate the Re-Examination Clause of the Seventh Amendment.[3]

II. IT IS WELL-SETTLED AMONG THE CIRCUITS THAT POST-JUDGMENT INTEREST IN A DIVERSITY CASE IS GOVERNED BY 28 U.S.C. SECTION 1961.

Petitioner has requested certiorari to decide whether post-judgment interest in a diversity case is governed by federal or state law. This Court should not grant certiorari to hear this settled issue as there is no genuine conflict among the circuit courts and the Second Circuit's ruling was consistent with this Court's rulings on conflicts of law.[4]

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[3] The fact that the Second Circuit reduced the amount of Petitioner's recovery on the jury verdict, standing alone, is insufficient to raise a Seventh Amendment claim. Indeed, this Court has held that the reduction of a jury award by remittitur does not run afoul of the Seventh Amendment. *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935).

[4] Petitioner also admits that "this issue was not squarely addressed before the lower court." Petitioner's Brief at 20 n.6. Thus, having failed to raise

(Footnote continued)

A. There Is No Genuine Conflict On This Issue.

The various Courts of Appeals to rule on this issue have uniformly held that post-judgment interest in diversity cases is governed by 28 U.S.C. section 1961. *See, e.g.*, *Mitchell Energy Corp. v. Samson Resources Co.*, 80 F.3d 976, 987 (5th Cir. 1996); *Dopp v. Pritzker*, 1995 U.S. App. LEXIS 30838, at *20 (1st Cir. Oct. 26, 1995); *Insurance Co. of North America v. Lexow*, 937 F.2d 569, 572 (11th Cir. 1991); *Mobil Exploration & Producing North America, Inc. v. Graham Royalty Ltd.*, 910 F.2d 504, 509 (8th Cir. 1990); *Transpower Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1423 (10th Cir. 1990); *Gorenstein Enters. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989); *Forest Sales Corp. v. Bedingfield*, 881 F.2d 111, 113 (4th Cir. 1989); *Pierce Assocs. v. Nemours Found.*, 865 F.2d 530, 548 (3d Cir.), *cert. denied*, 492 U.S. 907 (1989); *Gulf Oil Corp. v. Kruer*, No. 87-5636, 1988 U.S. App. LEXIS 3405, *5 (6th Cir. 1988); *Northrop Corp. v. Triad Int'l Marketing S.A.*, 842 F.2d 1154, 1155 (9th Cir. 1988).

The cases that Petitioner cites in support of its position that post-judgment interest is governed by state law were all decided prior to the 1982 amendment of 28 U.S.C. § 1961. *See* Petitioner's Brief at 15. Before the 1982 amendment, the statute had directed federal courts to use the interest rate provided by state law to calculate post-judgment interest. 28 U.S.C. § 1961 (1976 ed.). In 1982, Congress amended the statute to provide a uniform federal interest rate, based on the 52-week Treasury bill rate. 28 U.S.C. § 1961 (1982 ed.); *see also Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 831-32 (1990). Thus, the cases cited by Petitioner are all inapplicable to interpret the revised statute and fail to create any conflict among the Circuits.

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this issue below, Petitioner has waived its right to have this Court grant certiorari on the issue. *See supra* at I.A.

B. The Second Circuit's Ruling Is Consistent With This Court's Interpretations Of The Erie Doctrine.

This Court has never interpreted the *Erie* doctrine to require a federal court, in a diversity case, to apply a state statute in the face of a directly conflicting federal statute governing conduct in the federal courts. Instead, in *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court clarified the *Erie* doctrine to hold that federal courts are required to apply the Federal Rules of Civil Procedure in diversity cases, even where there is a direct conflict with a state rule. 380 U.S. 460 (1965). As this Court explained in *Hanna*:

> the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. . . .
>
> * * *
>
> Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. . . . To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

Hanna, 380 U.S. at 472-74. The reasoning in *Hanna v. Plumer* should apply equally to a Congressionally-enacted statute governing interest.

Lower courts that have expressly addressed the issue of whether the *Erie* doctrine requires application of a state

interest rate have concluded that the federal statute should prevail. *Transpower Constructors*, 905 F.2d at 1424; *Forest Sales Corp.*, 881 F.2d at 111-13; *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 623 (5th Cir. 1988); *Northrop Corp.*, 842 F.2d at 1156; *Weitz Co., Inc. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385 (8th Cir. 1983). Following the reasoning of *Hanna v. Plumer*, these courts have concluded that federal courts must apply the applicable federal statute over a conflicting state provision, unless the federal statute is unconstitutional. *Weitz*, 723 F.2d at 1386; *Nissho-Iwai Co.*, 848 F.2d at 623. They have further reasoned that Congress has the constitutional authority to enact a statute governing interest because post-judgment interest is "in some sense 'substantive,' in that it is a part of the damages recovered by the winning side, [but] is also easily susceptible of characterization as 'procedural,' since it has to do exclusively with events that occur after a dispute gets to court" and "therefore, is at most in 'the uncertain area between substance and procedure,' and 'rationally capable of classification as either.'" *Weitz*, 723 F.2d at 1386; *Nissho-Iwai Co.*, 848 F.2d at 623-24.

Finally, application of the federal interest rate is unlikely to lead to forum shopping. As the Eighth Circuit noted, "[i]t seems unlikely that a plaintiff would select a forum simply because of the rate of interest that a judgment will bear, because there is no way to know what the rate will be until the judgment is entered." *Weitz*, 723 F.2d at 1387; *see also Forest Sales Corp.*, 881 F.2d at 113. "Rules regarding post judgment interest 'do not furnish any greater incentive[] to use the courts of the United States than most of the other procedural features which are unique to the federal forum." *Transpower Constructors*, 905 F.2d at 1424 (quoting *Nissho-Iwai Co.*, 848 F.2d at 624). Therefore, the Second Circuit's ruling was consistent with *Erie* and *Hanna v. Plumer* and certiorari should be denied.

III. THE SECOND CIRCUIT'S RULING THAT POST-JUDGMENT INTEREST ACCRUES FROM THE DATE OF THE ORIGINAL JUDGMENT FOLLOWS THE TEACHING OF *KAISER* AND NO GENUINE CONFLICT EXISTS AMONG THE COURTS OF APPEALS.

A. The Second Circuit's Ruling Does Not Conflict With *Kaiser.*

The Second Circuit's decision was not inconsistent with this Court's holding in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990).[5] In *Kaiser*, this Court articulated that the test for determining whether interest should be calculated from an earlier judgment or a later judgment is whether damages have been ascertained in any meaningful way in the earlier judgment. 494 U.S. at 836. Based on the facts in *Kaiser*, this Court held that where the earlier judgment had been overturned by the District Court because the evidence did not support the damage award and where the District Court's ruling was never appealed, the earlier judgment did not ascertain damages in any meaningful way. Accordingly, the *Kaiser* court found that pre-judgment interest should not accrue from the earlier judgment. *Kaiser*'s specific holding was necessarily limited to the facts of that particular case. 494 U.S. at 870 (White, J., dissenting).

In determining that post-judgment interest should accrue from the date of the original judgment, the Second Circuit below followed the general rule established in *Kaiser* and determined that, with respect to Petitioner's claims, "the judgment was ascertained in a meaningful sense on August 21, 1992, the date on which the original judgment was entered

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[5] Petitioner also concludes, without explanation, that the decision below conflicts with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See* Petitioner's Brief at 23. *Munsingwear* involved an issue of *res judicata* where an appeal had been dismissed for mootness but the underlying judgment was never vacated. *Munsingwear*, 340 U.S. at 37-39. As such, it has no relevance to the issue of when post-judgment interest accrues.

following the jury verdict." App. C at 31a-32a. Moreover, the Second Circuit distinguished the facts of this case from *Kaiser*, noting that it had reinstated the jury verdict on Petitioner's claims against the Bank and Mr. Chokshi in full and had found that with respect to Petitioner's claims, the "original judgment was sufficiently substantiated by the evidence." App. C at 32a. Thus, the Second Circuit's ruling below does not conflict with *Kaiser* and certiorari should be denied.

B. There Is No Genuine Conflict Among The Circuits.

The Second Circuit's decision also does not conflict with rulings of the Fifth, Ninth or District of Columbia Circuits, as Petitioner claims. *See* Petitioner's Brief at 21-23. All of the cases cited by Petitioner followed the general principles established in *Kaiser* and held that post-judgment interest should run from the date of the original judgment, not the judgment entered on remand after appeal.[6] *See* Petitioner's Brief at 21-25. Thus, rather than establish any conflict among the circuits, the cases cited by Petitioner apply the *Kaiser* rule and, to that extent, they are all in accordance with the Second Circuit's decision.

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[6] *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614 (D.C. Cir. 1980), was decided before *Kaiser* and, therefore, is irrelevant. Similarly, *Falcon v. General Telephone Co.*, 815 F.2d 317, 320 (5th Cir. 1987) (Petitioner's Brief at 22), does not address the issue of when post-judgment interest accrues, but only discusses the effect of a vacated judgment on the "law of the case" doctrine. As such, it does not conflict with the Second Circuit's ruling below.

For instance, in *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 756-57 (9th Cir. 1983),[7] cited by Petitioner (Petitioner's Brief at 21), the court ruled that interest should run from the date of the original jury verdict, despite a subsequent judgment notwithstanding the verdict that was later reversed on appeal. The court reasoned that the date of the original verdict was the date that judgment should have been granted, if the court had not erroneously issued a judgment notwithstanding the verdict. *Turner,* 702 F.2d at 756-57.

In *Dunn v. Hovic*, the Third Circuit distinguished *Kaiser* in ordering that interest should accrue from the date of the original judgment. 13 F.3d 58, 60-61 (3d Cir.), *cert. denied*, 510 U.S. 1031 (1993), *cited in* Petitioner's Brief at 24. There, a jury awarded damages in favor of plaintiff, which the district court subsequently reduced on remittitur. *Dunn*, 13 F.3d at 60-61. The Third Circuit upheld the compensatory award and further remitted the punitive damage award. *Id.* The court reasoned that interest should run from the original judgment because the jury's determination of liability was upheld and "remittitur does not necessarily signify that the damages were not 'ascertained' in a meaningful way." *Id.*

The Third Circuit also ruled that interest should commence on the date of the original judgment even where a jury award was vacated as to one cause of action. *Loughman v. Consolidated-Pennsylvania Coal Co.*, 6 F.3d 88, 94 (3d Cir. 1993), *cited in* Petitioner's Brief at 24. In *Loughman*, the jury had awarded damages for the plaintiffs on causes of action for fraud, RICO and legal malpractice. Before judgment was

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[7] It should be noted that *Turner* was decided well before the *Kaiser* opinion was handed down in 1990. Similarly, two other cases cited by Petitioner as creating a conflict (Petitioner's Brief at 22 n.7), were also decided before *Kaiser*. *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111, 1113 (5th Cir. 1985) (holding that interest should accrue from date of original judgment unless appellate court alters original judgment in more than relatively minor aspects); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1211 (7th Cir. 1989) (ruling that interest would be calculated from initial judgment since jury verdict was reinstated).

entered, the district court *sua sponte* dismissed the malpractice claim. Subsequently, the district court vacated, reinstated then re-vacated the RICO judgment. It next vacated the jury award in its entirety and ordered a new trial on damages. *Loughman*, 6 F.3d at 94. The new trial was held and new damage awards were entered for plaintiffs. On appeal, the Third Circuit reversed, holding that the district court abused its discretion in setting aside the first damage award, the first award of punitive damages was supported by the record, the malpractice verdict should be reinstated, and the dismissal of the RICO claims was proper. *Id.* In ruling that the original judgment was the applicable date for interest, the court explained that it had effectively reinstated the original judgment, for which the essential liability and damage elements had been ascertained by the jury. *Id.*

In *H.J., Inc. v. Flygt Corp.*, 925 F.2d 257, 261 (8th Cir. 1991), *cited in* Petitioner's Brief at 24, the court also applied *Kaiser*'s general rule. The Court held that even though the jury award was affirmed in part and reversed in part and the case was remanded for a new trial, because a portion of the damages awarded in the original judgment was supported by the evidence, interest would run from the date of entry of the original judgment. *H.J., Inc.*, 925 F.2d at 261.

Similarly, the First Circuit stated that interest should accrue from the original judgment where the original judgment was upheld for the most part but modified on remand. *Cordero v. Mendez*, 922 F.2d 11, 15-16 (1st Cir. 1990), *cited in* Petitioner's Brief at 24. In *Cordero*, the district court entered judgment for the plaintiffs after a jury verdict. *Cordero*, 922 F.2d at 15-16. The Court of Appeals vacated the award and remanded for a new trial because of a concern that erroneous jury instructions may have resulted in duplicative damages. *Id.* The appeals court explicitly did not disturb the jury's finding of liability. *Id.* The court interpreted *Kaiser* to mean that "where a first judgment lacks an evidentiary or legal basis, post-judgment interest accrues from the date of the second judgment; where the original judgment is basically sound but

is modified on remand, post-judgment interest accrues from the date of the first judgment." *Id.*

In *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 997 F.2d 1340 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993), *cited in* Petitioner's Brief at 25, the court similarly ruled that post-judgment interest should commence from the date of entry of the first judgment. The court noted that "[m]uch of the case law indicates that an appeals court has discretion to select an appropriate date from which interest should run." *DeLong*, 997 F.2d at 1342. In *DeLong*, the jury had rendered a verdict in favor of plaintiff, the district court ordered a new trial and the appeals court reversed and reinstated the original jury verdict. *Id.*

As is demonstrated by the wide variation of facts in the above-discussed cases, the question presented by this case is not important because it will not have broad applicability to other cases. The Second Circuit's decision was based entirely on the specific facts and procedural history of the case before it. As one court has stated, "[w]hile the general standard is well formulated, its application in particular cases is often very fact specific." *Loughman*, 6 F.3d at 98. Therefore, this Court should not grant certiorari to hear this fact-specific question.

IV. PETITIONER WAIVED THE ISSUE OF WHETHER PRE-JUDGMENT INTEREST SHOULD BE COMPOUNDED BY FAILING TO RAISE IT BELOW.

Certiorari should also be denied as to the question of whether pre-judgment interest should be compounded according to state law because Petitioner failed to raise this issue before the district court. On appeal, the Second Circuit explicitly declined to consider this issue because it was waived below. App. C at 33a. Because Petitioner offers no exceptional circumstances justifying a departure from the Supreme Court's usual rule of refusing to address issues never raised or considered below, this Court should not grant certiorari to address this issue. *See supra* at I.A.

V. THE SECOND CIRCUIT'S DECISION TO UPHOLD THE DISTRICT COURT'S DISMISSAL OF PUNITIVE DAMAGES ON THE PRIMA FACIE TORT CLAIM IS CONSISTENT WITH GOVERNING AUTHORITY.

Finally, this Court should decline to consider the issue of whether Petitioner is entitled to recover punitive damages on its prima facie tort claim where the District Court refused to submit the issue to the jury and the Second Circuit did not disturb that ruling. Petitioner claims that the Second Circuit's decision was inconsistent with the Seventh Amendment and governing authority providing that punitive damages is an issue to be considered by the jury. Petitioner's Brief at 12 and 28. In other words, Petitioner contends that it was improper for the Second Circuit to affirm dismissal of the punitive damages claim as a matter of law. Petitioner's position, however, is unsupportable.

It is well-settled that a court does not violate the Seventh Amendment when it dismisses a claim that is legally insufficient. *See Galloway v. United States*, 319 U.S. 372, 374 (1942). The cases cited by Petitioner, *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1982) and *Benigni v. City of Hemet*, 879 F.2d 473 (9th Cir. 1988), do not contradict this basic rule, for those cases do not hold that a court is compelled to present a legally insufficient punitive damages claim to the jury. *See* Petitioner's Brief at 12 and 28. In fact, several Circuits have affirmed dismissals of legally insufficient punitive damages claims. *See, e.g., Vulcan Painters, Inc. v. MCI Constructors, Inc.*, 41 F.3d 1457, 1461 (11th Cir. 1995); *La Plante v. American Honda Motor Co., Inc.*, 27 F.3d 731, 745 (1st Cir. 1994); *L.E.S. Properties Hotel Venture, L.P. v. Westin Hotel Co.*, No. 93-55095, No. 93-55112, 1994 U.S. App. LEXIS 13092, at *4 (9th Cir. May 31, 1994), *cert. denied*, 115 S.Ct. 734 (1995)[8]; *Thompson v. State Farm Fire & Casualty Co.*, 34 F.3d 932, 942-43 (10th Cir. 1994); *Johnson*

[8] Cited subject to local rule 36-3 of the Ninth Circuit.

v. Cowell Steel Structures, Inc., 991 F.2d 474, 479 (8th Cir. 1993).

Moreover, *Le Mishal v. CBS*, 61 A.D.2d 291 (1st Dep't 1988) and *Walker v. Sheldon*, 10 N.Y.2d 401 (1961), cases on which Petitioner relies (Petitioner's Brief at 28), do not support Petitioner's contention that punitive damages are recoverable on a prima facie tort claim because plaintiffs in those cases did not assert prima facie tort claims. In fact, there are New York courts that have held that punitive damages are not recoverable on prima facie tort claims. *Walsh Bros. Inc. v. Ruppert*, 7 A.D.2d 896, 896 (1st Dep't 1959); *Winderbaum v. Winderbaum*, 39 Misc. 2d 478, 478 (Bronx Co. Sup. Ct.), *aff'd*, 20 A.D.2d 626 (1st Dep't 1963). Thus, based on the foregoing, this Court should not grant certiorari to consider whether it was proper for the Second Circuit to uphold the District Court's dismissal of the punitive damages pursuant to the facts of this case.

CONCLUSION

For the foregoing reasons, Respondents Bank of Baroda and Krishnakant C. Chokshi respectfully request that this Court deny the petition for a writ of certiorari.

New York, New York
November 18, 1996

Respectfully submitted,

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No. 96-606

In The

Supreme Court of the United States

October Term, 1996

INDU CRAFT, INC.,

Petitioner,

v.

BANK OF BARODA and
KRISHNAKANT C. CHOKSHI,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

I. This Court Should Review The Second Circuit's Extraordinary Expansion Of Its Reexamination Powers Under The Seventh Amendment

Petitioner argued that the Second Circuit departed from settled law in 3 major respects: (1) After finding the jury award "amply justified by the proof," P-14a, that Court refused to simply affirm the jury award as required by the Seventh Amendment, P-10;[1] (2) After explicitly reinstating the jury verdict, it reversed the jury's finding of no liability on the counterclaim, P-17a, 11; and (3) It refused to permit the jury decide the issue of punitive damages, P-12.

Respondents do not point to *any case* where *any court* did *any of the above*. Instead, they blithely assert that where both legal and equitable claims are involved, the court should decide the equitable claims after the jury decides the legal claims, R-5. They also claim that the issue of equitable setoff was not raised below, R-4.

Respondents' assertions are manifestly untenable, since *no* equitable claims were involved here. All claims and counterclaims were tried to, and decided by, the jury. That apart, the Second Circuit's decision – reducing a jury's damage award not for being excessive or otherwise violative of legal standards, *Gaspirini v. Center For Humanities, Inc.*, ___ U.S. ___, ___, 116 S.Ct. 2211, 2217 (1996), but for hitherto undiscovered "equitable" reasons – is unprecedented. Given these exceptional circumstances, the writ should be granted.

A. The Second Circuit's Reduction Of The Jury Award Was A Novel Extension Of Its Re-Examination Powers

Respondents do not even cite, let alone discuss, *Gaspirini*, 116 S.Ct. 2211 – which directly contradicts the decision at bar, P-9, 10, 11, 14-15! Instead, they argue that restitution/disgorgement

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[1] "P-" and "R-" refer to the Indu Craft's Petition dated October 9, 1996, and the Bank's "Brief in Opposition To Petition For Writ Of Certiorari" dated November 18, 1996.

actions are equitable which must be decided by the judge after the jury verdict and hence, the setoff was proper, *id.*

No restitution or disgorgement claims were at issue here. Indeed, respondents did not even *seek* an equitable setoff. *What they sought was reversal of the jury verdict on their counterclaims, which the Second Circuit granted,* P-17a. Hence, restitution and disgorgement cases, R-5, are irrelevant.

In any event, "Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." *Fitzgerald v. United States Lines Company,* 374 U.S. 16, 20, *reh'g den.*, 375 U.S. 870 (1963). *Accord, Chauffers, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 579 (1990) ("in mixed cases, . . . jury trial must precede a decision on the equitable claims – with the attendant collateral-estoppel effects," per Brennan, J. (concurring), *citing Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959)).

Cases cited by respondents, R-5, merely reiterate this,[2] or involved the "trial by jury" clause of the Seventh Amendment,[3] not the reexamination clause at issue, *Gaspirini,* 116 S.Ct. at 2222.

B. This Court Ought To Consider The Important Constitutional Questions Concerning Federal Courts' Power

Respondents' contention that the Seventh Amendment issue arising from the Second Circuit's award of equitable setoff "was never raised or considered below," R-4, is disingenuous. *The issue of equitable setoff was not before the Second Circuit*; that Circuit spontaneously invoked the theory for reducing the jury award. Petitioner had no chance of raising this issue.

In any event, this tremendously significant constitutional issue ought to be decided by this Court. *Glidden Co. v. Zdonak,* 370 U.S.

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[2] *See, e.g., Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962) (Claim for equitable accounting could not negate jury trial on contract claims subsumed within accounting claim).

[3] *See, e.g., Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989); *Tull v. United States,* 481 U.S. 412 (1987).

530, 536, *reh'g den.*, 371 U.S. 854 (1962) (constitutional grounds considered for first time); *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 230-31 (1990) "federal courts are under independent obligation to examine their own jurisdiction . . . "). The lower courts have made all factual findings necessary and only a legal question is presented. P-20 n.6; *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 697-98 (1984). *Hormel v. Helvering,* 312 U.S. 552, 557 (1941) ("Orderly rules of procedure do not require sacrifice of the rules of fundamental justice").

Indeed, this Court has even considered issues which were *never* raised where, as here, lower courts' actions were "fraught with potential prejudice". *Rogers v. United States,* 422 U.S. 35, 41 (1975); *see also Lebron v. National Railroad Passenger Corp.,* 115 S.Ct. 961, 962 (1995) (constitutional argument disavowed below, not raised in cert. petition, considered for first time on merits); *City of Houston v. Hill,* 482 U.S. 451, 467, *app. dis., cert. den.,* 483 U.S. 1001 (1987).

Thus, this case presents the exceptional circumstance of a federal appeals court acting contrary to well-established law, *Atlantic & Gulf Stevedores v. Ellerman Lines, Limited,* 369 U.S. 355, 359, *reh'g den.,* 369 U.S. 882 (1962) ("neither we nor the Court of appeals can redetermine facts found by the jury any more than the District can predetermine them. For the Seventh Amendment says, . . . ") – and that too without notice. *None of the cases cited by respondents, R-4, involved such a situation.* Hence, this Court's consideration of the issue is clearly proper.

II. Whether Postjudgment Interest In A Diversity Case Should be Governed by State Law Under *Erie* Is An Important Question Warranting Consideration

A. Applying Federal Law Violates the *Erie* Doctrine Since It Will Result In Significant Differences In Recovery, And Lead To Forum Shopping

The *Erie* doctrine precludes " 'substantial variations' between state and federal money judgments," P-14, *quoting Gaspirini,* 116 S.Ct. at 2221, and requires federal courts to respect States' dominant interest in prescribing postjudgment interest, long considered as item of substantive State law, P-15. Since State and federal

interest rates are different (often significantly[4]), diversity courts' application of 1961 also encourages forum shopping, P-15-17.

Respondents contend that postjudgment interest may be considered "procedural," and hence Section 1961 is within Congress' legislative power, R-9. No forum-shopping will occur, they say, since the federal rate is variable and litigants could not predict the rate applicable to specific cases, R-9. They also suggest that no conflict exists on this issue.[5]

Respondents are clearly wrong. First, applying 1961 to diversity cases inevitably results in *differences proscribed under Erie*: Here, the difference is already over $350,000.[6] *See also DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 997 F.2d 1340, 1342 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993), ("benefit worth roughly $1.5 million"). Such dramatic differences in the amount of recovery can be considered "procedural" only in a metaphysical sense.

Second, given the state/federal interest differential, forum shopping is ineluctable. The federal rate moves slowly; it has not exceeded the New York rate since May 1989! Many cases do *not* involve complex factual issues and permit early adjudication (often through summary judgment). In such cases, the litigant can easily predict whether the federal or state rate would be more favorable. Obviously, this makes forum shopping inevitable. Federal courts themselves have repeatedly recognized that the federal interest rate is too low, because there is no default risk with Treasury bills. *Gorenstein Enterprises, Inc. v. Quality-Care U.S.A., Inc.*, 874 F.2d

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[4] For example, here, the rates are 9% under the New York law and 3.41% under federal law.

[5] The Court ought to consider this issue since the interests of judicial administration will be served by addressing this important and recurring issue, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980), *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981), although it was not raised below in this form. *Anderson v. United States*, 417 U.S. 211, 223 (1974) (where the "substance of the present contentions" were raised below, and argument had "serious constitutional overtones").

[6] Being the interest differential at 5.59% (New York rate of 9% less federal rate of 3.41%) on the judgment amount of $2,268,865.43 for 3 years.

431, 437 (7th Cir. 1989). *Accord, American Telephone And Telegraph Company, v. United Computer Systems, Inc.*, 98 F.3d 1206, 1208 (9th Cir. Oct. 30, 1996) ("*AT&T*"); *Indu Craft*, P-44a.

B. Section 1961 Should Be Interpreted (As It Had Been, Prior To The 1982 Amendment) Consistent With The *Erie* Doctrine To Exclude Diversity Cases

Respondents offer no answer to the important issue of statutory interpretation that needs to be settled by this Court. As we pointed out earlier, P-17-20, the lower courts' interpretation of 1961 was manifestly contrary to well-settled precedent: Prior to the 1982 amendment, Section 1961 had never been applied to diversity cases, and *no* evidence existed of Congressional intention to change this interpretation. *Freedline v. Luxemburg*, 682 F.Supp. 311, 312 (M.D. La. 1988) ("The amendment made not one change in the operative language . . . "); *Lazzara v. Esser*, 622 F.Supp. 48, 50 (N.D. Ill. 1985), *aff'd in part*, 802 F.2d 260 (7th Cir. 1986) ("This Court cannot conceive that Congress, which has long been considering abolishing diversity jurisdiction altogether because of the ever-increasing federal caseload, would have adopted a federal interest statute applicable in diversity cases which would increase rather than decrease the number of federal cases without mentioning one word about its applicability to diversity cases in the legislative history"). Moreover, not applying 1961 to diversity cases also avoids the Constitutional issue of Congressional power over a state subject, P-17-20.

Respondents confirm that Section 1961 has been applied to diversity cases only after the 1982 amendment, R-7. Hence, this issue should be considered. *United States v. Speers*, 382 U.S. 266, 277 n.22 (1965) (argument relevant to statutory construction considered although not raised below).

III. The Conflict Between the Circuits With Respect To The Commencement Of Postjudgment Interest Under *Kaiser* Should Be Resolved

"The circuits differ over when postjudgment interest attaches if the appellate court vacates a judgment for the

plaintiff and the plaintiff then wins a second judgment in the district court." *Biscayne Oil & Gas, Inc., v. Burdette Oil & Gas Company, Inc.,* 1991 WL 224261 at *4 (4th Cir. Apr. 10, 1991) (unpublished disposition); *Boyd v. Bullala,* 751 F.Supp. 576, 581-82 (W.D.Va. 1990).

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990), permitted, but did not require, 1961 interest to accrue from the first judgment. *Kaiser,* 494 U.S. at 870 (per White J., and four other Justices, Dissenting). Accordingly, some Circuits chose the earlier judgment for 1961 purposes: Third,[7] Eighth,[8] First,[9] and Eleventh.[10] But – other than the Second Circuit here – *these decisions have uniformly relied upon 1961's underlying purpose of compensating the prevailing party for loss of use of the money.*[11]

Other Circuits however, ignored the compensatory purpose and chose the later judgment: Sixth,[12]

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[7] *Dunn v. Hovic,* 13 F.3d 58 (3d Cir.), *cert. denied,* 510 U.S. 1031 (1993); *Loughman v. Consolidated-Pennsylvania Coal Co.,* 6 F.3d 88 (3d Cir. 1993).

[8] *H.J., Inc. v. Flygt Corp.,* 925 F.2d 257 (9th Cir. 1991).

[9] *Cordero v. Mendez,* 922 F.2d 11 (1st Cir. 1990).

[10] *DeLong,* 997 F.2d 1340.

[11] *Dunn,* 13 F.3d at 61 ("We see no reason why Dunn should be disadvantaged in the calculation of interest because the jury overestimated his damages."); *Cordero,* 922 F.2d at 18 ("Calculating interest from the date of the second judgment would penalize appellees for the trial judge's error"); *Loughman,* 6 F.3d at 97 ("the purpose of 28 U.S.C. §1961 'is to compensate the successful plaintiffs for being deprived of compensation for the loss . . . '," *quoting Kaiser,* 494 U.S. at 835-36); *DeLong,* 997 F.2d at 1342 (Washington Mills (losing party) "would receive a windfall if it were not to pay Delong for the use of the funds for this time . . . that the district court erroneously set aside the earlier judgment should not result in a transfer of wealth from Washington Mills to its victim, DeLong.").

[12] *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.,* 917 F.2d 1413 (6th Cir. 1990), *cert. denied,* 502 U.S. 899 (1991), and *cert. denied,* 502 U.S. 808 (1991); *Adkins v. Asbestos Corp.,* 18 F.3d 1349, 1351 (6th Cir. 1994).

Tenth,[13] and Ninth.[14] As illustrated below, these cases cannot be reconciled – despite respondents' Herculean efforts, R-10-14.

For example, in *Andrulonis v. United States,* 26 F.3d 1224, 1233 (2nd Cir. 1994), the first judgment was for $5,978,409 against the government and the NYSDOH. *Andrulonis v. United States,* 924 F.2d 1210 (2nd Cir. 1991), *on recon.,* 952 F.2d 652 (1991), *cert. denied,* 505 U.S. 1204 (1992). The Second Circuit partially reversed, and remanded for recalculation of the setoff due under New York law for amounts received from other settling defendants. 924 F.2d at 1227. The parties settled for $5,357,240.00, and litigated on 1961 interest. 26 F.3d 1224. The Second Circuit held that while NYSDOH's percentage of liability for contribution was ascertained by the first judgment, "the dollar amount of damages to which the Government was entitled was not" and 1961 interest accrued from the later judgment. 26 F.3d at 1234. However, in *Cordero,* 922 F.2d 11, where the first judgment of $616,717 was vacated, 867 F.2d 1 (1st Cir. 1989), and, upon retrial, substituted with an award of $307,239.31, the First Circuit awarded 1961 interest from the first judgment. And in *Louisiana Power and Light Co. v. Kellstrom,* 50 F.3d 319, 332 (5th Cir.), *cert. denied,* 116 S.Ct. 173 (1995), the Fifth Circuit awarded 1961 interest on an attorney's fee award from the date of the first judgment on the merits – *a date when the fee award had not even been quantified.* While doing so, the *Fifth Circuit cited the Eighth Circuit*[15] *as being in agreement, and readily acknowledged the conflict with the Seventh and Tenth Circuits,*[16] 50 F.3d at 332.

Moreover, since the filing of this Petition, the Ninth Circuit has decided the issue in direct conflict with the Second Circuit's

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[13] *Wheeler v. John Deere Co.,* 935 F.2d 1090 (10th Cir. 1991).

[14] *AT&T,* 98 F.3d 1206.

[15] *Jenkins v. Missouri,* 931 F.2d 1273, 1276-77 (8th Cir.), *cert. denied,* 502 U.S. 925 (1991).

[16] *MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc.,* 962 F.2d 1470, 1476 (10th Cir. 1992) (stating that "[k]ey to the *Kaiser* holding is the date damages are 'ascertained' in a meaningful way"); *Fleming v. County of Kane,* 898 F.2d 553 (7th Cir. 1990) (awarding interest from date of award of fees).

decision here. In *AT&T,* 98 F.3d 1206, the trial court first confirmed an arbitration award against AT&T; the Ninth Circuit reversed and remanded. The trial court then vacated the award, and the Ninth Circuit reversed and confirmed the award. California's prejudgment interest rate being higher than the 1961 interest rate, AT&T, the losing party, sought accrual of 1961 interest from the first judgment. It argued – like the instant respondents – that under *Kaiser,* 1961 interest "must be calculated from the first judgment in which damages are sufficiently ascertained, regardless of any subsequent events, and regardless of any equitable considerations." 98 F.3d at 1210.

The Ninth Circuit disagreed, observing that *Kaiser* and its progeny never held that "interest must be calculated from the entry date of the first judgment ascertaining damages." 98 F.3d at 1210. Moreover, *all* the precedents (which included those cited by respondents here) were distinguishable on the grounds that (a) no prejudgment interest was available, or (b) prejudgment interest rate was lower than the postjudgment interest rate, or (c) the issue was not raised. *Id.* at 1211. Hence, in those cases, accruing 1961 interest from the first judgment favored the prevailing party. *Id.*

Faced with 2 judgments, "both of which sufficiently ascertain the damages," id., the Ninth Circuit held that 1961 interest accrued from the later judgment, not the earlier one, for two reasons. First, the earlier judgment was vacated at AT&T's request and rendered unenforceable until after remand. Second, prejudgment interest under California law more fully compensated the prevailing party. The Ninth Circuit explained:

> Where a prior judgment awarding damages has been vacated pursuant to the actions of an ultimately losing party, *equitable principles favor calculating the interest in a manner that more fully compensates the prevailing party. Any other result would penalize the prevailing party, and in certain circumstances might also encourage losing parties to instigate postjudgment litigation so they can reap the benefits of a low interest rate.* We see no inconsistency between this holding and the requirements of 28 U.S.C. § 1961 . . .

98 F.3d at 1211 (emphasis added).

This is patently contrary to the Second Circuit's ruling at issue, P-43a-46a. Earlier, in *Andrulonis,* 26 F.3d at 1233, the Second Circuit expressly disclaimed any "amorphous equitable power" for choosing the accrual date under 1961. Thus, the Second Circuit's pronouncements on the subject are indisputably in conflict with the Ninth Circuit's.

Thus, "this case presents a conflict among the Circuits over the proper application of an oft-used federal statute," *Chattem, Inc., v. Bailey,* 486 U.S. 1059 (1988) (per White, J., Dissenting). Accordingly, it is appropriate for this Court to resolve this conflict.

IV. This Court Should Consider The Question Whether The Appeals Court's Refusal to Consider Compounding of Interest Was An Abdication Of Its Responsibility Under Rule 37, Fed.R.App.P.

Petitioner argued that under New York law, interest is compounded where the defendant has acted in bad faith. Thus, the interest award here should have been compounded in view of the jury's finding of respondents' malevolence. P-27. And since Rule 37, Fed. R. App. P., "gives *appellate* courts discretion to decide the issue on a case by case basis," *Smith v. National R.R. Passenger Corp.,* 856 F.2d 467, 473 (2nd Cir. 1988) (emphasis added); *accord, DeLong,* 997 F.2d at 1342 (same), petitioner's failure to raise the issue before the trial court was not preclusive, P-27-28.

Respondents' feeble answer is that since the Second Circuit refused to address the issue, so should this Court.

This begs the issue, which is whether the Circuit's refusal is an abdication of its statutory responsibility under Rule 37. *Cfr., Leroy v. City of Houston,* 906 F.2d 1068 (5th Cir. 1990) (Court of Appeals may sua sponte recall mandate regarding interest). This question is of recurrent significance and ought to be addressed by this Court.

V. The Lower Courts' Decision To Withhold The Issue Of Punitive Damages From The Jury Was In Conflict With Relevant Decisions From Other Circuits And This Court

The trial court submitted Indu Craft's *Prima Facie* Tort claim to the jury Nevertheless, it refused to give the profferred instructions on punitive damages to the jury. The Second Circuit affirmed; but neither court said *anything* about punitive damages. P-28. Thus, respondents' suggestion that the lower courts dismissed the punitive damages claim "as a matter of law," R-15, is untenable, the unfairness of such an implicit ruling being only heightened by the jury's express finding of respondents' malice and bad faith.

As pointed out earlier, P-28, the lower courts' refusal to let the jury decide this issue was in conflict with relevant decisions of federal and state courts. It is well-settled that "It is not the form of the action that gives the right to the jury to give punitive damages, but the moral culpability of the defendant." *Walker v. Sheldon,* 10 N.Y.2d 401, 404-05 (N.Y. 1961). The moral culpability of respondents being clear, the jury should have been given the right to award punitive damages. *See also Hughes v. Patrolmen's Benevolent Ass'n,* 850 F.2d 876 (2d Cir. 1988), *cert. denied,* 488 U.S. 967 (1988) (upholding punitive damages award in case involving personal vendetta). This Court ought to review the issue.

CONCLUSION

The Writ ought to be granted, the above issues considered in depth after full briefing, the jury verdict reinstated in full, prejudgment interest compounded, and the case remanded for recalculation of postjudgment interest and a jury trial on punitive damages.

Respectfully submitted,

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Dated: New York, NY
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